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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 231

UNITED STATES OF AMERICA EX REL. HAROLD E. HIRSHBERG, PETITIONER,

vs.

CAPTAIN M. J. MALANAPHY, UNITED STATES NAVY, COMMANDING OFFICER, U. S. NAVAL RECEIVING STATION, BROOKLYN, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1948.

CERTIORARI GRANTED OCTOBER 18, 1948.

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2. Certified copy of Contract of Enlistment of relator in the United States Navy, dated March 27, 1946, for a term of four years (marked into evidence at folio 126) 110

3. Photostat copy of Continuous Service Record of relator from March 24, 1936 down to February 21, 1947, consisting of 6 pages (marked for identification at folio 140) 117

5. Certified copy of Affidavit of Rear Admiral T. L. Sprague, Chief of Naval Personnel, sworn to August 29, 1947 (marked into evidence at folio 150) 128

6. Photostat copies of Shore Patrol Log, United States Navy, 54th Street, Manhattan, New York City, consisting of 2 pages, dated Tuesday, March 26, 1946 and Thursday, March 28, 1946 (marked into evidence at folio 171) 131

7. Copy of Charges, Specifications, and Order of Trial lodged against relator bearing date of February 12, 1947 (marked into evidence at folio 190) 134

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8. Precept dated November 27, 1946 specifying the members of the General Court Martial before which relator was tried and convicted, signed by Rear Admiral Monroe Kelly, Commandant Third Naval District (marked into evidence at folio 191) 142

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A. Certified copy of page 9 of Service Record of relator dated March 26, 1946 (marked into evidence at folio 183) 145

B. Certified copy of page 9 of the Service Record of relator dated March 27, 1946 (marked into evidence at folio 183) 146

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United States Court of Appeals

FOR THE SECOND CIRCUIT

1

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Relator-Appellee,

—against—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent-Appellant.

2

Statement Under Rule 15

This proceeding was commenced by filing a petition for a writ of habeas corpus on August 18, 1947.

The names of the parties are stated in the caption. There has been no change in the parties to the proceedings. The writ of habeas corpus issued on August 18, 1947 and was served on the respondent with the petition, on the same day; and as the writ directs, a copy of the petition and the writ on August 18, 1947 was served upon the United States Attorney for the Eastern District of New York.

3

The return was filed on September 3, 1947.

The traverse was filed on September 8, 1947.

The writ was returned to the Court with the relator on August 19, 1947, and it was adjourned for argument until September 17, 1947.

The argument upon the return of the writ was held before Honorable Clarence G. Galston on September 17, 1947.

Statement Under Rule 15

4 The relator at the time the writ issued and was returned before the Court on August 19, 1947 was in the custody of respondent, under arrest, awaiting sentence after conviction by a Naval General Court Martial held at the Brooklyn Navy Yard between July 21 and August 12, 1947. Sentence upon the conviction had not then been imposed, but was subsequently, and after the writ issued. The custody of the relator was continued until the proceedings were determined on or about September 29, 1947 and the relator was not admitted to bail in the interim.

No matter was referred to any Commissioner, Master or
5 Referee.

On September 29, 1947 the United States District Court for the Eastern District of New York made and entered its order sustaining the writ and directing the release of the relator from the custody of the respondent.

The appeal was filed on December 23, 1947 in the office of the Clerk of the United States District Court for the Eastern District of New York.

6

Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 1193

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Relator-Appellee,

—against—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent-Appellant.

Notice is hereby given that M. J. Malanaphy, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York, Respondent-Appellant above named, hereby appeals to the Circuit Court of Appeals of the United States for the Second Circuit, from the final order and judgment entered herein on the 29th day of September, 1947, wherein the United States District Court for the Eastern District of New York granted the writ of habeas corpus issued herein on the 18th day of August, 1947.

Notice of Appeal

Dated: Brooklyn, New York,
December 23rd, 1947.

J. VINCENT KEOGH,
United States Attorney,
Attorney for Respondent-Appellant,
Office & P. O. Address,
521 Federal Building,
Brooklyn, New York.

To:

PERCY G. B. GILKES,
Clerk, United States District Court,
Eastern District of New York.

FRANCIS A. McGURK, Esq.,
c/o Richard S. Holmes, Esq.,
Room 1817,
42 Broadway;
New York, New York.

JOHN J. O'NEIL, Esq.,
25 West 43rd Street,
New York, New York.

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To Captain M. J. Malanaphy, Commanding Officer of United States Naval Receiving Station

—GREETING:

YOU ARE HEREBY COMMANDED, that the body of Harold E. Hirshberg by you restrained of his liberty, as it is said detained by whatsoever names the said Harold E. Hirshberg may be detained, together with the day and cause of his being taken and detained, you have before the Honorable Harold M. Kennedy, Judge of the United States District Court in and for the Eastern District of New York, at the court room of said Court, in the City of Brooklyn at 10 o'clock a.m., on the 19th day of August, 1947, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

WITNESS the Honorable Robert A. Inch United States District Judge at Brooklyn N Y this 18th day of August, A. D. 1947.

(LS)

PERCY G. B. GILKES
Clerk.

16 Let the writ of Habeas Corpus issue. Ordered that a copy of the petition and writ be served on the United States Attorney for the District and a copy on the respondent.

August 18, 1947

HAROLD M. KENNEDY
U. S. D. J.

17

18

Petition of the Relator, Harold E. Hirschberg

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

To the Honorables, the Judges of the United States District Court for the Eastern District of New York:

The petition of the relator, Harold E. Hirschberg, above named, respectfully alleges and shows to the Court:

1. That your petitioner is now illegally and contrary to law under arrest, restrained, detained and deprived of his liberty by the above named respondent.

2. That said illegal and unlawful arrest, restraint, detention and deprivation of the liberty of relator by respondent purports, as relator is informed and believes, to be under and pursuant to the conviction of relator by a Naval General Court Martial on August 12, 1947, for offenses alleged to have been committed by relator in violation of Article 8(2) of the Articles for the Government of the Navy of the United States during and between November 10, 1942 and March 1, 1944, while relator was a Japanese prisoner of war in the Philippine Islands after capitulation thereof to the Japanese on or about May 6, 1942; that said court martial was convened by the Secretary of the Navy and sat at the Navy Yard, Brooklyn, New York between July 21, 1947 and August 12, 1947, and tried relator upon the charges and specifications hereto annexed, made part hereof and marked Exhibit A.

22 3. That said court martial on August 12, 1947, announced its decision finding relator guilty and convicting relator upon Specifications numbered 1 and 3 of Charge 1 of Exhibit A; but finding relator not guilty on the remaining charges and specifications of Exhibit A. That the specifications upon which relator was found guilty, as aforesaid, are laid under and by virtue of Article 8(2) of the Articles for the Government of the Navy. Thereafter, and after the conviction of relator, as set forth above, relator was surrendered to the custody of respondent to await sentence upon the aforesaid conviction, and in the custody
23 of respondent relator still remains, illegally and contrary to law as set forth above.

4. That the aforesaid court martial, upon information and belief, in finding relator guilty and convicting him, as aforesaid, deprived relator of due process of law, in that it deprived him of his liberty, in violation of his rights under the Fifth Amendment to the Constitution of the United States, and thereby exceeded its jurisdiction and acted without jurisdiction of either relator or the offenses charged in Exhibit A and those of which relator was found guilty and convicted as aforesaid.

24 5. That the said court martial, upon information and belief, lacked jurisdiction of the charges mentioned and described in Exhibit A and those upon which relator was found guilty and convicted for the following additional reasons among others:

(a) Relator is presently an enlisted man in the United States Navy and of the grade of Chief Signal Officer, said enlistment having been entered upon by relator on March

27, 1946, in the United States of America, after the expiration on March 26, 1946 of a prior enlistment in the United States Navy, which prior enlistment expired and terminated at midnight of March 26, 1946, when relator received an honorable discharge and his mustering out pay, and thereafter and after the expiration of said prior enlistment and discharge, relator was restored to civilian status and his connection with the United States Navy was then and there effectively severed as was the jurisdiction of the aforesaid court martial over the person of relator as well as of the charges embraced in Exhibit A. Annexed hereto, made part hereof and marked Exhibit B is a duly certified copy of the service record of relator, reciting the aforesaid facts, which was received in evidence upon the aforesaid trial or relator before the court martial. 25 26

(b) The arrest of relator for the alleged offenses set forth and charged in Exhibit A occurred and took place on or about February 12, 1947, and the said charges, Exhibit A, were served upon relator on or about February 24, 1947, during his present enlistment, entered upon as aforesaid on March 27, 1946 in the United States; and, upon information and belief, the said charges and specifications did not survive the aforesaid honorable discharge, and therefore, relator was not amenable thereto nor to arrest therefor. 27

6. That it is unchallenged that relator became a Japanese prisoner of war on or about May 6, 1942 upon the capitulation of Corregidor, Philippine Islands, to the Japanese Army, at which time relator was attached to the Commander of the United States Navy Inshore Patrol, Corregidor.

28 7. Thereafter, and after his capture by the Japanese, as aforesaid, relator became a Japanese prisoner of war and was imprisoned and interned in various prisoner of war camps which were maintained, provided and administered by the Japanese Army and not by the Navy of the United States.

8. That, in the course of administration of said Japanese prisoner of war camps in the Philippine Islands, and after the capture of relator and while relator was in the status of Japanese prisoner of war, relator was put in
29 charge of a group of prisoners of war by the Japanese Prisoner of War Camp Commanders for the purpose of work details in said camps, which details were part of the administration thereof; and at no time did relator ever issue or give orders or commands or perform any acts or duties, or otherwise act, as personnel of the Navy of the United States; but such orders, commands, acts and duties as were given and performed by relator, were given and performed by the Emperor of Japan, through the Imperial Japanese Army, which appointed the commanders of said prisoner of war camps, and through relator in his status of prisoner of war, under the sole and exclusive jurisdic-
30 tion and in the complete control of the Japanese Army for the purpose of administration of said camps. That at no time was said Japanese prisoner of war camps and the administration thereof within the jurisdiction or in the command or control of the Navy of the United States, or of relator as personnel of said Navy of the United States.

9. That because of the status of relator as prisoner of war as charged in Exhibit A, the acts, commands, orders and duties performed and given by relator, were those of

the Imperial Japanese Army and in no sense were, or could be, violations of the Articles for the Government of the Navy, and more particularly of Article 8(2) of said Articles for the Government of the Navy, for violation of which relator has been found guilty and convicted and is now awaiting sentence at the hands of the said court martial. Therefore, as relator is informed and believes, the aforesaid acts, orders, commands and duties do not come within the exception in the Fifth Amendment to the Constitution of the United States which provides: "except in cases arising in the land and naval forces" no person shall be held to answer for a capital of otherwise infamous crime unless by indictment by Grand Jury; and that by failing and refusing to take relator out of the above quoted exception in the Fifth Amendment, the court martial deprived relator of his right to be tried otherwise than by court martial for the offenses set forth in Exhibit A, which was his right, and by such failure and refusal as aforesaid, the court martial assumed jurisdiction of offenses and of relator for commission thereof, which under the aforesaid Fifth Amendment, it was expressly deprived, as relator is informed and believes.

31

32

10. That in assuming jurisdiction as it did as set forth in paragraph 9 hereof, the court martial not only acted without jurisdiction, but exceeded its jurisdiction to hear and determine the charges, Exhibit A, and of relator, thereby depriving relator, as he is informed and believes, of his liberty without due process of law, as guaranteed to relator under the Fifth Amendment to the Constitution of the United States; and that the deprivation in this paragraph charged is in addition to the violation of relator's rights

33

34 under said Fifth Amendment charged in paragraph 9 hereof.

11. That the aforesaid court martial lacked, and exceeded its jurisdiction, as relator is informed and believes, of the charges set forth in Exhibit A, for the further reason that any offense committed by a prisoner of war is not a matter cognizable by the sovereignty of origin of the prisoner of war, but such jurisdiction rests and is confined to the rules and regulations of the army of the detaining power, in this case, the rules and regulations of the Im-
35 perial Japanese Army; and that the court martial had neither jurisdiction of the offenses charged as set forth in Exhibit A, nor of relator for alleged violations, if any there be, set forth therein; but in assuming jurisdiction violated the rights of relator under and by virtue of the Hague Conventions of 1899 and 1907 and the Geneva Convention of 1929.

WHEREFORE, relator prays that he be released from said unlawful arrest, custody and restraint of his liberty, and that this Honorable Court issue its Writ of Habeas Corpus, directing the aforesaid respondent to produce the body of
36 relator before this Honorable Court at a time and place to be specified therein, and that respondent be required to show cause, if any he have, why relator should not be released and discharged.

Dated, Brooklyn, N. Y. August 15th, 1947.

HAROLD E. HIRSHBERG,
Relator.

(Duly verified August 18, 1947.)

EXHIBIT A

Headquarters of the

COMMANDANT THIRD NAVAL DISTRICT
Federal Office Building, 90 Church Street
New York 7, N. Y.

22 JULY 1947

PUBLIC INFORMATION OFFICE
TEL: REctor 2-9100
Ext. 742-743

PRESS SECTION
TEL: CUmberland 6-4500
Ext. 2688-2689-2690

MEMORANDUM FOR THE PRESS:

Following are the charges and specifications preferred against Harold Edward HIRSHBERG, Chief Signalman, U. S. Navy, now before general court-martial in the New York Naval Shipyard:

CHARGE I

MALTREATMENT OF A PERSON SUBJECT TO HIS ORDERS

SPECIFICATION 1

In that Harold Edward Hirshberg, 223-29-64, Chief Signalman, U. S. Navy, while so serving with the U. S. Naval Forces, in the Far East area, and having been captured and made a prisoner of war by the Japanese, and while so

Exhibit A

serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp, pursuant to appointment by the Japanese authorities thereof, did, on or about 1 June 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one George N. Gaboury, carpenter's mate first class, U. S. Navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking the said Gaboury with his closed fists many times about the head and body; the United States then being in a state of war.

SPECIFICATION 2

In that Harold Edward Hirshberg, 223-29-64, Chief Signalman, U. S. Navy while so serving with the U. S. naval forces, in the Far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp pursuant to appointment by the Japanese authorities thereof, did, on or about 10 November 1942, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one Jim Edwards, private first class U. S. Army, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by

assaulting and striking the said Edwards with his closed fists many times about the head and body; the United States then being in a state of war. 43

SPECIFICATION 3

In that Harold Edward Hirshberg; 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the Far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp pursuant to appointment by the Japanese authorities thereof, did, on or about 1 February 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one Robert H. Welch, coxswain, U. S. Navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking the said Welch with his closed fists; the United States then being in a state of war. 44

SPECIFICATION 4 45

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty

46 officer in charge of a work section at said war camp, pursuant to appointment by the Japanese authorities thereof, did, on or about 1 February 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one George N. Gaboury, carpenter's mate first class, U. S. Navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking, catching hold of, and pushing the said Gaboury to the ground and did therein and thereby, then and there, inflict on the said Gaboury's
47 head and body multiple wounds and bruises; the United States then being in a state of war.

CHARGE II

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE

SPECIFICATION 1

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so
48 serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Camp Murphy, Zablin Field, Luzon, Philippine Islands, well knowing that the Japanese authorities at said war camp had theretofore caused to be inflicted unreasonable, cruel, brutal, and inhumane punishment, to wit, starvation and severe beatings upon American prisoners of war confined therein who were reported to the said Japanese authorit for alleged violations of Japanese regulations, and having good reason to

believe that the said Japanese authorities would continue to cause such punishment to be inflicted upon American prisoners of war, did, on or about 1 March 1944, at the aforesaid war camp, wilfully, knowingly, and without justifiable cause, report to the Japanese authorities at said war camp that one George Garrett, private, U. S. Army, a prisoner of war confined at said war camp, intended and planned to escape from said war camp, thereby exposing the said Garrett to unreasonable, cruel, brutal and inhumane punishment at the hands of the Japanese, as he, the said Hirshberg, well knew; and the said Japanese authorities acting upon the said Hirshberg's report, caused to be inflicted unreasonable, cruel, brutal and inhumane punishment upon the said Garrett, by starving him and striking him about the head and body with closed fists, clubs, straps, rifles, and by placing a garden hose in the mouth of the said Garrett, filling his stomach with water, and then standing on the said Garrett's stomach forcing him to expel said water, during a period of about three days, more or less, while he, the said Garrett, was confined to the guard house at said war camp, and the said Japanese authorities did, therein and thereby, then and there, inflict mortal wounds upon the head and body of the said Garrett, as a result of which said mortal wounds so inflicted as aforesaid, he, the said Garrett, died, during the said period, exact date to the relator unknown; the United States then being in a state of war. 49 0 1

SPECIFICATION 2

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. Naval forces, in the far East area, and having been captured and

52 made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Camp Murphy, Zablin Field, Luzon, Philippine Islands, well knowing that the Japanese authorities at said war camp had theretofore caused to be inflicted unreasonable, cruel, brutal, and inhumane punishment, to wit, starvation, and severe beatings upon American prisoners of war confined therein who were reported to the said Japanese authorities for alleged violations of Japanese regulations and having good reason to believe that the said Japanese authorities would continue
53 to cause such punishment to be inflicted upon American prisoners of war, did, on or about 1 March 1944, at the aforesaid war camp, wilfully, knowingly, and without justifiable cause, report to the Japanese authorities at said war camp that one William R. Hill, private, U. S. Army, and one John L. Baker, Private, U. S. Army, prisoners of war confined at said war camp, had conspired and planned to escape from said war camp, thereby exposing the said Hill and the said Baker to unreasonable, cruel, brutal and inhumane punishment at the hands of the Japanese, as he, the said Hirshberg, well knew; and the said Japanese authorities acting upon the said Hirshberg's report, caused to
54 be inflicted unreasonable, cruel, brutal, and inhumane punishment upon the said Hill and the said Baker, and by striking the said Hill and the said Baker about the head and body with closed fists, clubs and straps, during a period of about three days, more or less, while they were confined to the guard house at said war camp, and the said Japanese authorities did therein and thereby, then and there inflict multiple wounds and bruises upon the head and body of the said Hill and the said Baker; the United States then being in a state of war.

Exhibit A

SPECIFICATION 3

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the Far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Island, did, on or about 1 March 1943, in the mess hall at said war camp, wilfully, maliciously, and without justifiable cause, strike one George Garrett, private, U. S. Army, a prisoner of war confined at said war camp; the United States then being in a state of war.

SPECIFICATION 4

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, did, on or about 1 February 1943, at said war camp, wilfully, maliciously, and without justifiable cause, strike one Johnson, an enlisted man in the U. S. Army given name and rank to the relator unknown, a prisoner of war, confined at said war camp; the United States then being in a state of war.

Exhibit A

58

CHARGE III

ASSAULTING ANOTHER PERSON IN THE NAVY

SPECIFICATION

In that Harold Edward Hirshberg, 223-29-64, Chief Signalman, U. S. Navy, while so serving with the U. S. Naval Forces, in the Far East area and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field,
59 Luzon, Philippine Islands, did, on or about 20 February 1943 at said war camp, wilfully, maliciously, and without justifiable cause, assault one Thomas B. Hurtt, chief signalman, U. S. Navy, a prisoner of war confined at said war camp; the United States then being in a state of war.

* * * * * * * * * * * * *

60

EXHIBIT B

PAGE 9 OF SERVICE RECORD

HIRSHBERG, Harold Edward

223 29 64 CSM(PA) 04111-25 USN

Permanent Shore Patrol, 3ND

---

26 March 1946

Discharged at New York, New York this date with HONORABLE DISCHARGE for reason of expiration of enlistment. Is recommended for reenlistment. Is recommended for Good Conduct Medal
AUTH: Bupers Manual, Art. D-9104.

/s/ R. T. Kern, Lieut. Comdr., USNR.
Executive Officer, By direction

MARKS UPON DISCHARGE: 3-26-46

Proficiency in Rate:	3.9	
Leadership	3.9	
Conduct	4.0	RTK

FINAL AVERAGE IN MARKS UPON DISCHARGE

Proficiency in Rate:	3.8	
Seamanship:	3.6	
Ability as leader of men	3.7	
Conduct	4.0	RTK

CERTIFIED TO BE A TRUE COPY:

J. J. O'Neil

J. J. O'NEIL, LT. COMDR. USNR

Return to Writ of Habeas Corpus

64 UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. No. 1193.

[SAME TITLE]

I hereby certify to the Honorable Harold M. Kennedy, one of the Judges presiding in the United States District Court for the Eastern District of New York, as follows:

65 Captain M. J. Malanaphy, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York, upon whom has been served a writ of habeas corpus for the production of the relator, Harold E. Hirschberg, respectfully states as follows, to wit:

1. That he holds said relator by authority of the United States as an enlisted man in the United States Navy, subject to naval jurisdiction.

66 2. That the said relator duly enlisted in the United States Navy on March 24, 1936.

3. That thereafter the said relator continued in the service of the United States Navy, and was still in the service of the United States Navy on or about May 6, 1942, when the relator was captured by the armed forces of the Japanese Nation and made a prisoner of war.

4. That thereafter relator was eventually released from the domination of the Japanese and on September 10,

1945, he reported to the United States Naval Authorities for reprocessing and subsistence. 67

5. That thereafter an order for the trial of the relator, upon various charges and specifications, was duly issued by the United States Naval Authorities. A copy of said charges and specifications is attached to the petition of the relator herein, and marked Exhibit "A". Your respondent adopts and incorporates the said charges and specifications marked Exhibit "A" as a part of this return.

6. That thereafter, on or about August 12, 1947, at a trial before a duly convened Court Martial, relator was convicted of specifications 1 and 4 of Charge I. 68

7. That the aforesaid proceedings, findings, and record of conviction, returned by the Court Martial in the case of the relator, were declared legal and the sentence approved by the convening authority. That the record of proceedings has been duly forwarded to the Secretary of the Navy for review by him.

Obedient, however, to the mandate of said writ, the respondent herewith produces before the Court the body of the said relator, and prays this Honorable Court to dismiss the said writ and remand the relator to the custody of respondent, to be dealt with according to law. 69

M. J. MALANAPHY
Captain, U. S. N.

(Duly verified August 29, 1947.)

Traverse to Return

70 UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK

Misc. 1193.

[SAME TITLE]

Relator, above-named, by Francis A. McGurk, his attorney, for his traverse to the return herein, alleges:

71 1. Answering the allegations of paragraph 1 thereof, relator admits that he is an enlisted man in the United States Navy, and as such, since on or about March 27, 1946, has been subject to naval jurisdiction as provided in the Articles for the Government of the Navy, being the Act approved July 17, 1862, Chapter 204, 12 Statutes at Large, page 600. Except as herein specifically admitted, relator denies each and every allegation of paragraph 1 of the return.

2. Answering the allegations of paragraph 3 thereof, relator admits he was in the service of the United States
72 Navy on or about May 6, 1942, and that on or about that date was captured by the Imperial Japanese Army and made a prisoner of war. Except as herein specifically admitted, relator denies each and every allegation of paragraph 3 of the return.

3. Answering the allegations of paragraph 5 thereof, relator admits that an order for the trial of relator on the charges and specifications mentioned in said paragraph 5 was issued on or about February 12, 1947. Ex-

cept as herein specifically admitted, relator denies each 73
and every allegation of paragraph 5 of the return.

4. Answering the allegations of paragraph 6 thereof, relator admits that on or about August 12, 1947, after trial by court martial, said court martial purported to find relator guilty of the alleged offenses mentioned and described in specifications 1 and 3 of Charge 1 of Exhibit A annexed to the petition herein, and alleges that then and there said court martial informed relator, his counsel and the public press that the passing of sentence would be postponed without date, and that neither the time thereof nor the sentence was then fixed. Relator alleges upon information and belief, that neither on August 18, 1947, when the writ of habeas corpus herein was served, nor the return day thereof on August 19, 1947, had the sentence of relator and the time for imposition thereof been fixed. Relator further alleges, that on or about August 28, 1947, and after service of the writ of habeas corpus herein on August 18, 1947, and while the proceedings thereon were pending and undetermined, respondent, the court martial and the convening authority proceeded to sentence relator and to publish such sentence to the world in direct violation of the stay of all proceedings incident to the issuance and service of said writ. Except as herein specifically admitted, relator denies each and every allegation of paragraph 6 of the return. 74 75

5. Answering the allegations of paragraph 7 thereof, relator admits the proceedings, findings and purported conviction and sentence of relator were approved by the convening authority. Except as herein specifically admitted, relator denies that he has any knowledge or in-

76 formation sufficient to form a belief as to the truth of each and every allegation of paragraph 7 of the return.

Wherefore, relator demands that the writ of habeas corpus be sustained and the relator be released and discharged from the custody of respondent.

FRANCIS A. MCGURK,
Attorney for Relator,
Room 1817, 42 Broadway,
Borough of Manhattan,
77 New York City.

(Duly verified September 4, 1947.)

78

Order Sustaining Writ

At a term of the United States District Court, Eastern District of New York, duly held at the Court House thereof, No. 271 Washington Street, Borough of Brooklyn, City of New York, on the 29 day of September, 1947. 79

PRESENT:

HON. CLARENCE G. GALSTON,
United States District Judge.

[SAME TITLE] 80

This proceeding having duly come on to be heard before the Court on September 17, 1947, and after reading and filing the petition of relator for the writ of habeas corpus duly sworn to August 18, 1947, and the writ of habeas corpus duly issued thereon out of and under the seal of this Court on August 18, 1947, returnable before this Court on August 19, 1947, with due proof of the service of said petition and writ by the United States Marshal on the above named respondent and the United 81
States Attorney for the Eastern District of New York on August 18, 1947, the Return of respondent, to said writ, duly sworn to August 29, 1947, with proof of due service thereof on the attorney for relator on September 3, 1947, the Traverse by relator of said return, duly sworn to September 4, 1947, with proof of due service thereof on the United States Attorney for the Eastern District of New York, attorney for respondent, on September 8, 1947; and the hearing having been adjourned on August

82 19, 1947, to September 17, 1947, and on said September 17, 1947, the relator having been produced in Court on the writ of habeas corpus, the Court having heard and received the evidence and proofs of the parties hereto, and relator, upon the argument, having moved the Court to enlarge relator on his own recognizance and otherwise, as the Court might direct, and that pending determination of these proceedings relator be restored to his status and grade in the Navy as it existed on August 16, 1947, when this Court acquired jurisdiction, and before the sentence of the Court Martial was begun to be executed
83 by the Navy; and also having moved to correct the grade of relator, alleged in paragraph 5 (a) of the petition for the writ from Chief Signal Officer to Chief Signalman, nunc pro tunc as of August 18, 1947, and after hearing Francis A. McGurk, Esq., attorney for relator in support of the writ and motions, and J. Vincent Keogh, Esq., United States Attorney, attorney for respondent, in opposition thereto, and due deliberation thereupon having been had, and the Court having filed its opinion in writing.

Now, on motion of Francis A. McGurk, attorney for
84 relator, it is

ORDERED, that the motion to enlarge relator and to restore him to the status and grade held by relator in the Navy on August 18, 1947, before execution of the sentence of the Court Martial, pending determination of these proceedings be, and the same hereby is, denied;

and it is further

Order Sustaining Writ

ORDERED, that the writ of habeas corpus herein be, and the same hereby is, sustained, and the relator, Harold E. Hirshberg, be, and he hereby is, released and discharged from the custody of respondent, Captain M. J. Malanaphy, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York; and it is further 85

ORDERED, that Captain M. J. Malanaphy, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York, be, and he hereby is, directed, forthwith, to release and discharge from his custody Harold E. Hirshberg, the above named relator. 86

CLARENCE G. GALSTON
United States District Judge

I desire to add to the record of this proceeding that during the hearing of Relator's petition, I understood that the Relator was an enlisted man in the United States Navy and of the grade of Chief Signalman.

C. G. GALSTON
U. S. D. J. 87

Hearing on Return to Writ of Habeas Corpus

88 UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 1193

[SAME TITLE]

Brooklyn, New York,
September 17, 1947,
10:30 a. m.

89 Before:

HONORABLE CLARENCE G. GALSTON,
U. S. D. J.

Appearances:

FRANCIS A. MCGURK, ESQ.,
Attorney for Relator Hirshberg.

J. VINCENT KEOGH, ESQ.,
United States Attorney for the Eastern District of New York,
90 *For the United States of America.*

Mr. McGurk: Before going into an argument on the points in the briefs, I would like to call the Relator for the purpose of proving some facts.

The Court: Certainly, and I call the attention also of counsel to the fact that with the briefs there were filed some

exhibits. Well, they are not exhibits in the case until they are offered in the proceeding. 91

Mr. Keogh: That was the first thing I intended to do. Before the Relator is called, may I take up a general item? Since the essence of this writ brings to issue the question of jurisdiction of the court martial, I should like to have your Honor seek to limit the argument on that point and the collateral points rather than what has taken place since the Court convened. The question before your Honor is whether the court had jurisdiction at the time it convened.

The Court: I shall hear argument as the matter develops, Mr. Keogh.

Mr. Keogh: I should not like to interrupt the Relator's argument. 92

The Court: I will do the interrupting where it is necessary.

HAROLD EDWARD HIRSHBERG, the Relator, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. McGurk:

Q. Mr. Hirshberg, what is your grade in the Navy, please? A. Chief Signalman. 93

Q. What is your present grade? A. Apprentice seaman.

Q. When did you acquire that grade? A. On the 29th of September.

The Court: What year?

The Witness: 1947, sir.

94 Q. Just recall yourself for a minute. It could not be the 29th of September, 1947. A. I beg your pardon. August 29, 1947.

Q. What was the occasion on which that grade was acquired, please? A. I received the sentence of the court, of my court martial. They reduced me to that grade on that date, sir.

Q. I show you this document, consisting of six pages, bearing date August 29, 1947, signed by Monroe Kelly, Rear Admiral, U. S. Navy, Commandant, Third Naval District, and I ask you if on the 29th of August last, at the time
95 you just stated, you received that document (showing papers to witness)? A. Yes, sir. I received this copy, sir.

Q. Just describe to the Court what happened on the 29th of August at the time you got that or before it?

Mr. McGurk: I offer that in evidence.

Mr. Keogh: No objection.

The Court: Let me see it.

(Papers handed to the Court.)

The Court: Received.

96 (Papers received in evidence and marked Relator's Exhibit 1.)

Q. Now, Mr. Hirshberg, will you describe, please, to the Court, what happened on the 29th day of August at or about the time that Exhibit No. 1 was read to you, please? A. At approximately 1 P. M. of the 29th of August, 1947 I was ordered to report to the officer in charge of the Third Naval District Brig in the Flushing Receiving Station, Brooklyn and I was read my sentence by the Court and ap-

proved by the convening authority, which was Rear Admiral Kelly, the Commandant, Third Naval District, and I received a sentence of 10 months, to be reduced in rating to Apprentice Seaman and to be dishonorably discharged from the United States Navy, and the sentence was carried out, sir, from that date. 97

Q. You are now in execution, in the Brig, as you call it, which is really the jail,—in execution of that sentence; is that right? A. Yes, sir.

Q. Do you receive now the same pay you received as Chief Signalman? A. No, sir.

Q. When, if you know, was that pay stopped? A. As far as I know, sir, it was stopped the 29th of August, according to Navy regulations. 98

Q. 1947? A. 1947, yes, sir.

Q. Now, the writ of habeas corpus in this case issued on August 18th, 1947. Will you tell us what your status or grade was then? A. I was a Chief Signalman, permanent appointment, and I was awaiting the action of the Federal Court here on the writ of habeas corpus.

Q. On the 19th day of August, pursuant to the mandate of the writ, you appeared in this Court, did you not? A. Yes, sir.

Q. And the case at that time was adjourned until today; that is correct, isn't it? A. Yes, sir. 99

Q. On the 18th day of August of 1947 and down to the 29th day of August, 1947, will you state what your pay or salary was? A. From August—

Q. Will you state to the Court, please, what your pay as a Chief Signalman was on August 18, 1947? A. My base pay was $165.00 a month, plus longevity, plus certain allowances.

100 Q. Which brought it up to how much? A. About $275.00 a month, I believe, sir.

Q. And that continued up to when? A. August 29th.

Q. Now, after the 29th, commencing on the 29th, what was your pay? A. I believe I receive pay as a prisoner of the Navy at the rate of 10 cents per day, which is to be used for health and comfort articles.

Q. Have you been able, Mr. Hirshberg, to get this 10 cents a day pay that has been given to you that you have just spoken of? A. No, sir.

Q. When is that, if you know, payable to you as a
101 prisoner? A. 30 days after my sentence I will have accrued $3.00, which I can submit a request to draw that $3.00 for health and comfort articles.

Q. Up to the 29th day of August, 1947 had you worn your uniform as a Chief Signalman? A. Not in the brig area, sir.

Q. Not where? A. Not in the brig area.

Q. When you appeared in Court on the 19th day of August, 1947 you appeared with brass buttons and your hash marks on the sleeve of your coat or tunic, as a Chief Signalman; is that right? A. Yes, sir.

Q. When was that uniform taken away from you? A.
102 The date of the sentence, August 29, 1947.

Q. What else ensued after the 29th day of August, 1947 because of this putting into execution the sentence of the court martial? A. I believe that I—

Q. Don't tell us what you believe. Tell us what happened? A. I was taken out of the status of a detentionary and made a regular prisoner of the Navy to carry out all rules and regulations and orders I receive as a prisoner, and I

was unable to draw any monies that I had accrued on the Navy rolls that were due me. 103

Q. How much, if you know, was that money? A. Approximately $400.

Q. And you are a married man with a family? A. Yes, sir.

Q. And the monies which were accrued and which you say are on deposit with the Navy which theretofore you had been able to draw and cannot now draw, are necessary for the support of your family; is that right? A. Yes; sir.

Mr. Keogh: If your Honor please, I am forced to renew my suggestion made earlier— 104

The Court: I find all this wholly irrelevant.

Mr. Keogh: That is the basis of my objection.

Mr. McGurk: The reason I am doing it is because of the motions I made—

Mr. Keogh: To which I would like to address the Court.

The Court: Why don't you let him finish?

Mr. McGurk: (Continuing) Which were all alluded to in my main brief and I am going to ask your Honor on this hearing that this man be restored to the grade in which he was, with all its incidents and emoluments, as of August 18, 1947 on this ground: 105 On the 18th day of August, 1947 this Court acquired complete jurisdiction, not only of the body, but of all the incidents that adhere or attach to his body. Among those incidents were that this matter be kept in status quo ante as of the 18th day of August, or at least, as of the 19th day of August, 1947. Now, it is our contention, sir, as you will see from the brief,

106 that in flagrant disregard of that status quo and as an incident, mark you, as an incident to the stay implicit in the writ, which was that that matter be kept in status quo until this Court had exhausted its jurisdiction to determine whether or not the sentence of the court martial was void or not, depending on whether the court martial had jurisdiction, which is the merits of this controversy, and I maintain that this Court, not as an idle gesture, but in vindication of its order implicit in the writ, should restore this man here and now, or from this day forth, to
107 that grade and all the emoluments incident thereto and that the execution of the sentence be stayed. I mean it was no idle gesture that we had this writ issued and I don't think it was an idle gesture of the Court to take jurisdiction of the case, but your jurisdiction is certainly imposed upon. It certainly is not a vindication if we let the execution of this sentence stand in view of the writ.

The Court: I cannot go along with you on your argument, Mr. McGurk. The writ commands the respondent to produce the relator, and for one pur-
108 pose only, that is to inquire into the lawfulness of his custody by the respondent. It behooves the respondent to be able at any adjournment, or at any session of this Court, to produce the relator. He is in charge of the body, but there is no law that I know of which compels this Court to read as implicit in the writ of habeas corpus to stay the execution of the sentence. The obligation of the writ, I repeat, is to produce the body of the relator at any session of this Court in

which it is necessary to have him present. So I cannot go along with you on that. 109

Mr. McGurk: Your Honor will note my exception, and I don't believe you will prohibit me from putting into the record those things which we will have to review.

The Court: I think that is true enough, but you understand I have ruled with respect to the legal question now raised.

Mr. McGurk: I understand that, but will your Honor let me make this record full, so that in the event we have to go upstairs we may have a full 110 record to review, and your Honor's instructions to me now, without putting me in contempt?

The Court: Certainly.

Mr. Keogh: If the Court please, I renew my objection to the testimony adduced up to this point as not being pertinent.

The Court: Mr. Keogh, I have sustained that objection.

Mr. Keogh: I further move to have it stricken.

The Court: So far as its relevancy is concerned, or materiality, or competency, I grant the motion, 111 but for the purpose of enabling the relator to make a record which he may desire to use on appeal, I will let him go forward, and for that purpose only.

Mr. Keogh: Because of an appeal, I am as much concerned, as I know the Court is, to have whatever evidence is adduced here pertinent to the argument of this writ and I not to elaborate upon those things that may be of human interest, or possibly sympathy, but none of which, I say, is pertinent to the particular business at hand.

112 The Court: You may be sure I am not going to decide this motion on the basis of sympathy.

Mr. Keogh: Thank you.

Q. Mr. Hirshberg, in addition to the decrease in your pay, what else transpired as a result of the sentence being put into execution? Well, you were degraded, weren't you? A. Sir?

Q. You were degraded? You were taken out of the grade of Chief Signalman? A. Yes, sir.

Q. And put into that of what? A. Apprentice Seaman.

113 Q. And your uniform as Chief Signalman was removed from you; is that right? A. Yes, sir.

Q. And you are not permitted to take this money out of the coffers of the Navy that you need to support your wife and family; is that right? A. Yes, sir.

Q. What else? A. While I am awaiting the decision of the Federal Court I am to remain in the Third Naval District's brig, sir.

Q. Now, Mr. Hirshberg, when did you first begin your naval service? A. March 24, 1936, sir.

Q. That was for a period of how many years? A. A minor cruise until I obtained a maturity of 21 years old.

114 Q. When did you obtain that maturity of 21 years of age? A. May 18, 1939, I believe it was.

Q. You ought to know. You are the man who is growing old. When did you obtain your maturity? A. 1939, sir.

Q. At that time what became of the minor enlistment? A. Ordinarily I would have been discharged from the United States Navy and given an opportunity to reenlist for a period of four years. I was on the Asiatic station at

that time, in Hongkong, China, and I chose to extend that enlistment by my own volunteering for a period of two more years. 115

Q. Now, just let me interrupt you there, please. At that time when the minor enlistment expired did you receive a discharge? A. No, sir.

Q. You did not? A. No, sir.

Q. You extended it for two further years? A. Yes, sir.

Q. Which brought you up to when? A. To November 8, 1941.

Q. What occurred then? A. My enlistment had terminated. 116

Q. By "Terminated" you mean it expired by limitation of its own terms; is that right? A. Yes, sir.

Q. Did you receive at that time a discharge? A. Yes, sir.

Q. What kind of a discharge was it? A. An honorable discharge.

Q. Was it a certificate, or something that you could frame and hang up on the wall? A. Yes, sir.

Q. Do you remember what date that was that you got that discharge? A. November 8, 1941, sir.

Q. Now, could you tell the Court when after November 8, 1941 you reenlisted? A. Yes, sir. 117

Q. When? A. I reenlisted on March 27, 1946, sir.

Q. Intermediate of the expiration of your prior enlistment and your reenlistment you came back to the Navy as a navy man or as a civilian? A. I came back as a civilian, I believe.

Q. You were in civil life intermediate of the expiration of the enlistment and subsequent reenlistment; is that right? A. Yes, sir.

118 Q. Your reenlistment happened, you say, on the 8th of March, 1941; is that right? The reenlistment, the first reenlistment, happened on the 8th of March? A. The 8th of November, 1941.

Q. How long was the term of the enlistment that you then entered upon? A. A period of four years, sir.

Q. And that expired when? A. It should have expired November 8, 1945.

Q. On November 8, 1945 where were you? A. I was under hospital care.

Q. Where? A. At Brooklyn, New York; U. S. Naval
119 Hospital.

Q. Did you get an honorable discharge at the Brooklyn hospital at the expiration of the enlistment? A. No, sir.

Q. Would you state why, if you know? A. I was under medical care and there was to be a sort of a court of survey to test and decide whether I was in health to continue in the naval service, and that went on until about January, I believe, of 1946, and I was discharged from the Naval Hospital with the recommendation of the Board of Medical Survey for duty, that is, general service in the United States Navy, and I was sent to duty. Shortly after that I
120 requested permission to be discharged and made my intentions later to reenlist.

Q. Now then, in January of 1946 you were cured and restored, or recommended as fit for naval duty by the hospital? A. Yes, sir.

Q. Will you state whether or not at that time you received a discharge from the Navy? A. No, sir.

Q. When did you receive a discharge from the Navy? A. March 26th theoretically I received it.

Q. I am not talking about theory. I am not talking about theory; I want to know what the fact is. When after January 16, 1946, when you came out of the hospital, did you receive a discharge from the Navy? I am not now speaking about something that you fill out and put in a frame and hang on the wall; I am talking about a discharge by the Navy? A. March 26, 1947. 121

Q. And there is no theory about that, is there? A. No, sir.

Q. You just said you received a discharge on the 26th day of March, 1947. Is that correct? A. 1946, sir.

Q. March 26, 1946? A. That is right. 122

Q. And your reenlistment at that time expired as of what time of day? According to the Navy rules, when did the enlistment expire? A. I believe at the time you are actually discharged. I don't know those regulations.

Q. Does it not expire at midnight on the last day of the term of the enlistment? Isn't that the Navy regulations? A. Yes, sir, I believe so.

Q. Then your enlistment that you just described expired at midnight on March 26, 1946; is that right? A. Yes, sir.

Q. And at that time you were in Brooklyn? A. Yes, sir. 123

Q. Where did you live during that period? A. Granada Hotel, sir.

Q. With whom? A. With my wife, sir.

Q. Did you reenlist after the 26th of March, 1946? A. Yes, sir.

Q. When? A. I reenlisted on the 27th of March, 1946.

Q. At what time of day, do you remember? A. I believe it was in the late part of the afternoon, sir.

124 Q. Of March 27, 1946? A. Yes, sir.

Q. Between the 26th day of March, 1946 at midnight and the 27th day of March, 1946 late in the afternoon, would you say that you were not in the Navy? A. I would say I was not, sir, I was a civilian.

Q. And you came back to the Navy late in the afternoon of March 27, 1946 from civil life; is that it? A. Yes, sir.

Q. I show you, Mr. Hirshberg, what purports to be a true copy of your enlistment subscribed by you on March 27, 1946 and ask you if that appears to you to be a true
125 copy of that enlistment contract (showing paper to witness)? A. I would say yes sir.

Mr. McGurk: I offer it in evidence.

Mr. Keogh: No objection except for the fact it is already in evidence, your Honor. That is one of the exhibits I offered at the opening.

Mr. McGurk: That is not in evidence yet in this proceeding. It is on file.

Mr. Keogh: At the opening I asked that the exhibits be accepted, A to F.

The Court: I did not understand that to be the
126 case. Received.

(Copy of enlistment record received in evidence and marked Relator's Exhibit 2.)

Q. I show you six photostat pages which were supplied by the Navy, or by the United States Attorney, as purporting to set forth your service record, and I ask you if they set forth your entire naval service record up to the last

date shown on it (showing papers to witness), now let me 127
tell you how to begin. This is off the record. Beginning at the top, you see it is 1936. Read the column headings across and begin at the top.

The Court: I think Mr. Keogh probably would concede this if you want to keep it as a record.

Mr. Keogh: It is another one of the exhibits I referred to.

Mr. McGurk: I think the concession is given very nobly and in the noble spirit in which it is given I accept it; but, however, there are certain amendments 128
which have to go into that photostat. I mean it is not full and complete. It is almost enough, but not quite.

(The question was repeated by the Reporter.)

Mr. McGurk: I withdraw the question.

Q. Now, there is only one discharge shown on this? A. Yes, sir.

Q. Does this completely and adequately set forth your periods of naval service? A. No, sir. 129

Q. Will you point out to the Court what is missing from it? A. On the 26th of March, 1946 at permanent shore patrol headquarters at New York, New York I was discharged honorably by reason of expiration of enlistment and there is no further mark showing that I was reenlisted in the Navy.

Q. The reenlistment is absent; is that right? A. Yes, sir.

Q. Go back further, earlier in your record, and tell me—

130 Mr. Keogh: If I may interrupt here, I think that the witness ought to be asked to read the next line, Mr. McGurk, rather than give us the impression it is not in there.

Q. Did you hear what the United States Attorney just said? A. Yes, sir.

Q. Did you read the next line after the one you just read where it says about the expiration of your term? A. Permanent Shore Patrol, Third Naval District, New York, New York; change of status, E; date, 27 March, 1946;
131 Chief Signalman; 4 years.

Q. Does it say anything about reenlistment? A. At the top it says "Term of enlistment or extension".

Q. "Term of enlistment or extension"? A. Yes, sir.

Q. Was there any extension of your enlistment? A. No, sir.

Q. It was a reenlistment, wasn't it? A. Yes, sir.

Q. But the reenlistment is not shown; that is your point, is that right? A. Yes, as far as my knowledge goes.

Q. Go back further in your record—

132 Mr. Keogh: May I interrupt again? I think we could go on with this indefinitely. I think the exhibit speaks for itself. The change of status is in a different column as of March 27, E; in the third column over, the term of enlistment or extension is the head of the column and "4 years" is entered. Now, if there is any question that that needs an interpretation by this witness, or by the Court, or by some expert from the Navy, I will say that in my opinion it does not, because it speaks for itself.

The Court: It apparently does not reflect what he thinks should be stated. 133

Q. Now, will you go on earlier and see if there are any more things left off or any other things you say should be on there or should there appear? A. The same thing occurs in 1941, sir, as far as I can see.

Q. What is that? A. It has discharged on the U. S. S. Pillsbury in Cavite, Philippine Islands, on the 7th of November, 1941, as a Signalman First Class.

Q. What kind of a discharge is that? A. Expiration of enlistment, an honorable discharge. 134

Q. What is the thing that you say is missing from that that you have in your hand? A. The next line.

Q. No, I am not talking about the next line. Tell me as a conclusion, please, what is missing? A. I don't understand this. I mean that I was reenlisted.

Q. Tell me what you say is missing? A. That I was reenlisted.

Q. It does not show your reenlistment? A. No, sir. I don't understand it, sir.

Q. What is the symbol or what is the statement that you do not understand? A. Under date of 7 November, the same day, on U. S. S. Pillsbury at Cavite, Philippine Islands, change of status, E, as a Signalman First Class, and under the head of "Term of enlistment or extension" it again has, 4 years. 135

Q. What is your quarrel with that, Mr. Hirshberg? A. I do not know whether or not it shows I was discharged or not, sir—rather, that I was reenlisted, sir.

Q. Do you have any recollection that goes back to that time as to when and under what circumstances you reenlisted? A. Yes, sir.

136 Q. You do? A. Yes, sir.

Q. Will you state what they are? A. On the 7th of November I was discharged—

Q. What year? A. 1941, sir. I was discharged by reason of expiration of enlistment.

Q. And you were where then? A. In the Philippine Islands, sir.

Q. That was just a month before Pearl Harbor; is that right? A. Yes, sir; exactly a month. I had given my—made known that I would like to reenlist, that a person could not be discharged on foreign soil due to being at the
137 Philippine Islands, and I was reenlisted on board, discharged and reenlisted and transferred to the signal station at the Cavite Navy Yard.

Q. Did you receive at that time a certificate of discharge? A. Yes, sir.

Q. Did you sign a contract of reenlistment? A. Yes, sir.

Q. Now go back earlier, or pursue the whole thing, and tell me what other deficiencies there are, if any? A. The same thing happened again in Canton, China.

Q. What date? A. The 8th of November, 1939, U. S. S. Mindanao, Canton, China, change of status, expiration of
138 enlistment, date, 8 November 1939, rating, Signalman Third Class, and term of enlistment or extension, 2 years, and my marks.

Q. Did you at that time, in Canton, China, receive a certificate of honorable discharge? A. No, sir.

Q. You did not? A. No, sir. I wouldn't have, sir.

Q. I beg your pardon? A. It is not—I don't believe you don't receive a discharge when you extend your current enlistment.

Q. That is the difference between an extension of an enlistment and a reenlistment; is that right? A. Yes, sir. 139

Q. What other deficiencies do you claim exist therein? A. I don't notice any others.

Q. You don't notice any others? A. No, sir.

Mr. McGurk: I ask that this be marked for identification.

(Photostat marked Relator's Exhibit 3 identification.)

Mr. Keogh: May we have an understanding as to whether my original request to have all exhibits put into evidence has been granted? 140

The Court: Mr. Keogh, when the Government's turn comes to offer evidence I will consider it. The relator is now offering his evidence. When your case comes up I shall consider the offer.

Mr. Keogh: At the opening of this proceeding you mentioned the exhibits and I offered them in evidence.

The Court: My comment was merely that there were certain matters before me which were labeled exhibits which were, in fact, not exhibits. Now, if the Government wants to offer them when its time comes it may offer them. 141

Q. I show you, Mr. Hirshberg, what purports to be on the cover, "Health record, U. S. Navy, Harold Edward Hirshberg," and I call your attention to the second page after you open the book, and I ask you to state, please, what that refers to. I am now referring to the date of March 25,

142 1946 which appears at the top of that second page (showing health record to witness)? A. On the 25th of March 1946 I applied for reenlistment and was accepted and examined physically for reenlistment in the United States Navy. I beg your pardon. On the 25th of March my enlistment had expired.

Q. Your enlistment had expired? A. Yes, sir, and this shows—

Q. Just a moment, please. We have had testimony from you a moment ago that your enlistment expired on the 26th day of March, 1946 at midnight. Now I call your
143 attention to the date of March 25th, on page 2, that you now have open before you, in the health record, and I ask you what the date of March 25, 1946 applies to, or refers to? A. The date is March 25, 1946 and it is the date that I was examined for discharge.

Q. That is the date the examination commenced; is that right? A. Commenced, yes, sir.

Q. Where was the examination held? A. At the medical division of Headquarters, Commandant, Third Naval District.

Q. Where is that? A. 90 Church Street, New York
144 City.

Q. Do you know, or do you recall, how long that examination took before it was finished? A. ' s final completion was, I believe, the following day, sir.

Q. On the 26th of March, 1946; is that right? A. Yes, sir.

Q. Now, then, just examine that record and tell me if it shows any other data that you say should be in there if you know? Now take your time, because you have only one occasion to look at this and don't slur it over. A. On the last page I see a notation that I was examined physi-

cally for re-enlistment in the United States Navy, sir. 145
That is on March 27, 1946.

Q. That is stated on there? A. Yes, sir, "Examined this date and found to be physically qualified for re-enlistment in the United States Navy."

Q. Will you state, please, when the examination which you have just spoken of, as beginning on the 25th of March, 1946, for your discharge, was completed, if you know, or if that paper you have in your hand refreshes your recollection? A. I do not understand that, sir.

(The question was repeated by the Reporter.) 146

Q. Is that perfectly clear? A. Yes, sir. It started on the 25th and it was completed on the 26th. That was when the result of the blood counts and Kahn and Wassermann were known.

Q. You have turned to the last page. Will you do that again? A. Yes, sir.

Q. You have just stated that your examination for re-enlistment was completed on the 27th of March, 1946. Now I ask you whether or not there was any examination made of you physically or otherwise for the purpose of re-enlistment on the 27th of March, 1946? A. The entry 147
here shows that on the 27th of March the examination took place for re-enlistment. It shows I was qualified physically for re-enlistment, sir.

Q. My question is: After they finished with your examination to discharge you from the Navy on the 26th of March, 1946, and in the face of that endorsement, or whatever is written there, did they begin again and examine you to re-enlist you? Now you may give me your own recollection. Was there another examination? Did you

148 go through all the ropes again? As a matter of fact, tell me without looking at the paper or your examining this page, did they examine you physically, did they take blood counts; did they put a stethoscope over your heart? A. I only remember the examination for discharge, sir; not for re-enlistment.

Q. Then the statement on that paper that the examination for re-enlistment was completed on the 27th of March, 1946 does not state a fact; is that right? A. I would say yes, sir.

149 Mr. McGurk: I would like to have that marked for identification.

(Health record marked Relator's Exhibit 4 for identification.)

Mr. McGurk: I offer in evidence, if your Honor please, what purports to be an attested and true copy of the affidavit of Rear Admiral T. L. Sprague, U. S. Navy, Chief of Personnel, sworn to August 29, 1947 in the District of Columbia and which bears the venue of the City of Washington and that district and is entitled and underscored in agate type at the top "Affidavit re Service in United States Navy of Harold Edward Hirshberg, Chief Signalman U. S. Navy" and it was annexed to the main brief of the respondent.

150

The Court: Any objection, Mr. Keogh?

Mr. Keogh: No, sir.

The Court: Received.

(Affidavit of Rear Admiral Sprague received in evidence and marked Relator's Exhibit No. 5.)

Mr. McGurk: You may examine. 151

Cross Examination by Mr. Keogh:

Q. Upon March 27, 1946 did you wear a naval uniform? A. March 27th did you say, sir?

Mr. McGurk: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McGurk: Exception.

A. When I was re-enlisted I wore a naval uniform, sir. 152

Q. You told us that late in the afternoon of March 27, 1946 you re-enlisted? A. Yes, sir.

Q. I ask you now whether you wore a uniform on March 27, 1946? A. At that time, yes, sir.

Q. Had you in the morning of that day worn civilian clothes? A. Yes, sir.

Q. When you answered Mr. McGurk's question as to your discharge on March 26, 1946 you said something about "theoretically," which Mr. McGurk did not ask you to continue with. I now ask you what did you mean by that?

153

Mr. McGurk: I object to that, sir.

A. I don't remember the question, sir.

Mr. McGurk: Just a moment, Mr. Hirshberg, until I make the objection. I object to that as incompetent, irrelevant and immaterial and asking for a conclusion of law, which is directed to your Honor.

154 The Court: I overrule the objection.

Mr. McGurk: Exception.

A. (Continued) I don't remember the question, sir.

Q. May I help you to refresh your recollection? A. Yes, sir.

Q. When Mr. McGurk referred to your discharge of March 26, 1946 and directed your attention to that fact, you said yes, you were discharged on March 26, 1946 theoretically. A. Yes, sir.

Q. At which Mr. McGurk—

155 Mr. McGurk: Just a moment, please, I object to the question and I move to strike out the answer on the ground that that calls for a legal conclusion which is for the decision of the Court.

The Court: Overruled.

Mr. McGurk: Exception.

Q. At which time Mr. McGurk did not allow you to complete your statement. I now ask you to go on and tell the Court what you were going to say. A. Yes, sir. When I said "theoretically" I meant—

156 Mr. McGurk: Same objection, if your Honor please, to that.

The Court: Overruled.

Mr. McGurk: Exception.

A. (Continued) I meant that I had not received a discharge in my hand. I had not I had been discharged, and I considered myself discharged but due to a directive from the Navy Department that discharges were not

being issued at that time, I believe in order to conserve paper, which had been a war provision, I meant theoretically. When I said that, I meant that I had not gotten the paper in my hand, sir. 157

Q. Had you at any previous time received a certificate of discharge from the Navy? A. Yes, sir.

Mr. Keogh: No further questions.

Mr. McGurk: Just one further question I should have asked before. Will your Honor permit me to put this one?

The Court: Yes. 158

Redirect Examination by Mr. McGurk:

Q. In March of 1946 where were you assigned to duty, Mr Hirshberg, please? A. In March of 1946?

Q. In March of 1946, A. I was assigned to duty in the Third Naval District Shore Patrol, sir.

Q. Where was it located? A. The headquarters were located at 54th Street and Eighth Avenue in the 18th Precinct, New York City, and I had an office in the 68th Precinct, 43rd Street and Fourth Avenue, Brooklyn, New York.

Q. Where were you living at that time? A. I was living at the Granada Hotel. 159

Q. With your wife? A. Yes, sir.

Q. I show you this page of a book which was produced here pursuant to a subpoena duces tecum served upon Captain Lawton, Chief of Staff to Admiral Berkey, who is acting commandant of the Third Naval District, yesterday, and I call your attention to the entry on that page which bears date at its head "Tuesday, 26; 46 March,"

160 which means, I take it, Tuesday, March 26, 1946; and I ask you if your name appears on that page (showing paper to witness)? A. Yes, sir.

Q. Will you just state what the entry is that appears by your name?

Mr. McGurk: I withdraw the question.

Q. Where does your name appear on the page? A. Under the heading of "Tuesday, 26 of March, 1946 at 0120."

161 Q. What does that teach us? A. Twenty minutes after 1 in the morning, sir.

Q. Yes. A. "Chief Hirshberg on deck to check conditions," with the initials "A. R." next to it.

Q. Who is "A. R."? A. I don't remember. Probably a desk sergeant.

Q. What does that mean? A. On Tuesday, the 26th of March, I went on duty at midnight at the 68th Precinct in Brooklyn as chief in charge of the Naval Shore Patrol in the Borough of Brooklyn.

Q. Now turn over to the next page, which is marked there by something sticking out of the top of the book. Do you see it?

162 A. Yes, sir.

Q. What date is at the top of that page? A. Thursday, the 28th of March.

Q. Does your name appear on that page headed "Thursday, the 28th of March, 1946"? A. Yes, sir.

Q. Where? A. At 1755, which is five minutes to 6, there is an entry, "Chief Hirshberg on deck," with the initials "G. J. S."

Q. What does "on deck" mean? A. I reported for duty, sir. 163

Q. Will you examine the pages intervening the 26th day of March 1946 and the 28th day of March 1946 and tell us, please, whether or not your name appears on any of those intervening pages? Examine it carefully, please? A. Yes, sir.

Q. Where? A. The same date, the 25th.

Q. The 25th of March, 1946? A. Additional, sir.

Q. What? A. Yes, sir.

Q. I am asking you whether or not, intervening March 26, 1946. That is the starting point. Now the next point 164
you want to stop at is the 28th day of March 1946. So we have there all of the 27th and all of the 28th. We are not concerned with the 25th. Is that clear or isn't it? A. Yes, sir. I understand. No, sir, my name does not appear.

Q. What is that book that you have in your hand? A. This is the shore patrol log for the Borough of Brooklyn.

Q. What does that teach us? What is the log? What is its function? A. Its function is that it logs accurately, in the rough, by a person designated to do so, a record of all persons attached to that patrol or that particular station and what went on during those hours, who was on duty and who went off duty, what arrests were made, 165
what action was taken, everything that would happen of importance in an official form that goes in this book.

Q. Go back there again to the first page where your name appears, on March 26, 1946, Tuesday. Have you got that? A. Yes, sir.

Q. And you appear there as inspecting; is that right? A. Yes, sir.

166 Q. At what time of day? A. That was 1:20 in the morning, sir.

Q. Can you state from that entry, does it refresh your recollection or have you any independent recollection, as to when your tour of duty ended? A. Yes, sir.

Q. From that entry? A. I know that, being on duty at 20 minutes after 1 in the morning, I would have to come on duty at midnight.

Q. When would your tour of duty expire? A. My tour of duty would have expired at 8 a. m. in the morning, sir.

Q. Of March 26, 1946? A. Yes, sir.

167 Q. Open the book again to the 28th day of March; Thursday, March 28th? A. Yes, sir.

Q. Now you have your entry there, have you? A. There is no entry.

Q. Oh yes, there is an entry on the 28th of March 1946, which was Thursday. "On deck"; "Hirshberg on deck at 6 o'clock at night," is that right? The 28th day of March, 1946, "Hirshberg on deck"? Do you see it?

The Court: You may come in and point it out to him.

Mr. McGurk: He just read it off, sir.

168 Q. Now you have found that entry, have you, on the 28th day of March, Thursday, 1946? A. Yes, sir.

Q. What is the entry again? A. "At 1805," or five minutes after 6 in the evening, "Chief Hirshberg off deck to 68th with Dubois," initials "G. J. S."

Mr. McGurk: I offer in evidence, if the Court please, the two entries we have just had read in

evidence: one, the 26th day of March, 1946 entry 169
and the other 6 o'clock entry on the 28th day of March, 1946, taken from this log which the witness has used to refresh his recollection.

Mr. Keogh: I have no objection to this being an exhibit in evidence, but from a practical standpoint I think it would be better to have a photostat of each page rather than tie up these log books of the Navy.

The Court: It will be understood a photo tatic copy may be substituted for the original.

Mr. McGurk: I have no objection to photostats 170
provided they have the same force and effect as the original and that, of course, will be understood.

The Court: I could not direct otherwise, could I, Mr. McGurk?

Mr. McGurk: I mean the Navy is a conundrum to me.

The Court: The court is perhaps also a conundrum to you.

Mr. McGurk: No, the Court and I understand each other perfectly, I hope.

The Court: Then you understand a substitution of a photostat will have the same force and effect 171
as the original.

Mr. McGurk: Yes, your Honor.

(Entries received in evidence and marked Relator's Exhibit 6.)

Mr. McGurk: You may examine.

172 *Recross Examination by Mr. Keogh:*

Q. As a result of what you have just testified to from the log, we find that you were on duty March 26, 1946 and you were on duty March 28, 1946? A. Yes, sir.

Q. On March 28, 1946 did you return to duty with the Shore Patrol in the 68th Precinct in Brooklyn? A. Yes, sir.

Q. Did you return to the same office that you had used on March 26, 1946? A. Yes, sir.

Q. In Exhibit 4 marked for identification you read an
173 entry to which I now refer you and ask that you reread it, at the top of the page. A. "Medical history, Hirshberg—"

Q. Excuse me. The typed part starting March 27th. A. "Hirshberg, Harold Edward; Naval Headquarters, Third Naval District, New York, N. Y., 27 March, 1946. Examined this date and found to be physically qualified for re-enlistment in United States Navy."

Q. Thank you. After that examination and your re-enlistment, as you testified to before, late in the afternoon of March 27th, did you return to the 68th Precinct? A. I wasn't examined on that date, sir.

174 Mr. McGurk: Sing it out. I didn't get you.

A. I was not examined on that date for re-enlistment, sir.

Q. On the 27th of March? A. The entry says—

Q. You say this is not correct; is that it? A. Yes, sir.

Q. But you did tell us that on March 27th you did re-enlist? A. Yes, sir.

Q. Late in the afternoon? A. Yes, sir.

Q. In uniform? A. Yes, sir.

Q. After having removed, as you testified to yourself, civilian clothes; is that right? A. Yes, sir. 175

Q. What happened after that re-enlistment for the rest of the day of March 27, 1946? A. I called up my superior at the 68th Precinct and told him I had re-enlisted. I had what is called subsistence and I was living and being paid by the Navy to live and eat outside.

Q. We understand that. You called your superior at the 68th Precinct? A. Yes, sir.

Q. What was said? What did he say to you? A. I explained I had re-enlisted and asked him if I should report back to the same place I had been, that I understood I was still in the Third Naval District Shore Patrol, and he told me my first watch would be, I believe, on the 28th at the same office. 176

Q. This conversation took place on March 27, 1946? A. Yes, sir.

Q. At possibly what hour? A. I don't really remember. I believe it was 4 or 5 o'clock, sir, in the afternoon.

Q. So that the man who was keeping the log at the 68th Precinct would have had no reason to enter you as being on deck on March 27, 1946; is that right?

Mr. McGurk: I object to that as calling for a statement which is not in evidence. 177

The Court: I sustain the objection to the form of the question.

Q. When you read from the log there was no entry of March 27, 1946 of your being on deck for the 68th Precinct? A. Yes, sir.

178 Q. Who was the superior to whom you spoke on the telephone? A. I believe it was the Chief of the Shore Patrol, Bogelman.

Q. And you spoke to him after your re-enlistment? A. Yes, sir.

Q. And he excused you from duty for the rest of that day? A. He told me my watch would start on the 28th.

Q. You now know why that entry is in the log, don't you? A. No, sir.

Q. You did not appear at the 68th Precinct on March 26th, did you? A. No, sir. I wasn't in the Navy.

179 Q. I am talking about immediately after you re-enlisted? A. Yes, sir. I as told to get in touch with my superior and I carried out that order, and I was given further orders and I carried those out, sir.

Mr. Keogh: No further questions.

Mr. McGurk: That is all that I have, sir.

The Court: The Relator rests.

Mr. Keogh: There is some question as to the custody of this Exhibit 4 marked for identification. It is an official naval record; a health record, and it has been marked for identification. The custody
180 of it, even having been marked for identification, is being questioned because of its being an original record. May we know whether it is going to be offered in evidence, or, if it is not going to be offered in evidence, may we arrange to have a photostat of it?

Mr. McGurk: I have not offered it. I just had it marked for identification. I have rested.

The Court: All right. Has the Government any witnesses to call?

Mr. Keogh: No, sir. 181

The Court: Do you want to offer those exhibits, Mr. Keogh?

Mr. Keogh: Yes, sir. I re-offer—

The Court: No, not re-offer. This is an original offer.

Mr. Keogh: Those are the exhibits that have been marked A, B and F. Where the others have not been offered in evidence by Mr. McGurk I now offer in evidence to complete the record.

The Court: They may be received.

Mr. McGurk: Will you hear me for one moment, 182 please, on the relevancy of A, B and F?

The Court: Yes.

Mr. McGurk: I don't know that I have a great deal of objection to A and B. I think they are cumulative. However, I won't object to them. F, as I see it, is this small brochure here which has to do—

The Court: That is the debate before the Senate—

Mr. McGurk: On one of the articles of the Navy which is not in question here, and as an example of industry in the place it should be commended, but I object to it, sir, as incompetent, irrelevant and immaterial. 183

The Court: Even if it were not received as an exhibit, it would be received as a public document covering debate in the Senate. I overrule your objection.

Mr. McGurk: Exception.

(Documents previously marked Exhibits A, B and F received in evidence.)

184 The Court: Do you rest, Mr. Keogh?

Mr. Keogh: The Government rests.

The Court: The Government rests.

Mr. McGurk: Shall we go on with the argument? It is ten minutes to 1. I should not like to be interrupted.

The Court: Now, the situation is this: At 2 o'clock Judge Rayfiel is to be inducted as a Judge of this Court and I shall attend that induction. How long it will last I do not know. It would seem to me a desirable thing to do would be to have argument
185 taken up tomorrow morning at 10:30.

Mr. McGurk: I cannot get here. I cannot get here, your Honor, because I will be out of the State.

The Court: How much time do you need?

Mr. McGurk: Probably a half hour or three-quarters of an hour.

The Court: If you can confine it to a half hour, what I could undertake to do is to resume at 3 o'clock.

Mr. McGurk: All right. That is very fine, Judge.

The Court: How about you, Mr. Keogh?

Mr. Keogh: That is satisfactory to me, your
186 Honor.

The Court: I shall adjourn now until 3 o'clock.

(Recess was taken to 3 p. m.)

AFTER RECESS 187

Mr. McGurk: Will your Honor permit me to recall Mr. Hirshberg for one question?

The Court: Yes.

Mr. McGurk: The reason I ask it, sir, is to put in evidence a copy of the charges which were served upon the Relator, to show when these proceedings were commenced. I think that is important. I omitted it this morning.

The Court: Isn't that attached to the petition? 188

Mr. McGurk: No. This is the original charge served upon him. The petition has attached to it the charges, but they were gotten up for the press.

HAROLD EDWARD HIRSHBERG, resumed:

Redirect Examination by Mr. McGurk:

Q. I show you these five pages, Mr. Hirshberg, six pages, bearing date February 12, 1947, and I ask you if that is a copy of the charges that were served upon you when these proceedings were first begun (showing papers to witness)? 189
A. I would say yes, sir.

Q. When did you receive those? A. The 24th of February, 1947.

Mr. McGurk: I offer in evidence the papers just identified by the witness less the pen and ink and pencil notations on each of the pages.

190 Mr. Keogh: No objection.

(Copy of charges received in evidence and marked Relator's Exhibit 7.)

Mr. McGurk: That is all.

Mr. Keogh: No questions.

Mr. McGurk: I should like to offer at this time a copy of the precept referred to in my brief, bearing the date November 27, 1946, which, upon the court martial, was argued as being the date upon which
191 these proceedings were begun.

Mr. Keogh: No objection.

(Copy of precept received in evidence and marked Relator's Exhibit 8.)

Mr. McGurk: Thanks, sir. Now, with those two addenda, I am ready to proceed with the argument. Shall I begin?

The Court: Yes.

Mr. McGurk: If your Honor please, the Relator attacks the jurisdiction of the court martial here
192 upon four major grounds. The first ground is that there was no relationship, no functional relationship, existing, if you please, between Relator and United States Navy at the time the commission of the offenses of which he stands convicted were posited. Second, that the treaties, the three treaties involved here, are the two Hague conventions of 1899 and 1907 and the Geneva convention of 1929, being of the same obligation and upon the same level and

footing as a statute of the United States, rather of 193
equal validity and of no greater sanctity than a statute, and that the treaties, being subsequent to the articles of war, Article 1200 which annexes 71 or more articles of war, repealed, because later in date, those articles. Third, that the treaties themselves occupy, with respect to prisoners of war, the entire field, if you please, the entire field with respect to adjudicating the rights of prisoners of war. Fourth, that because of the honorable discharge received by the Relator on the 26th of March, 1946, that was the equivalent of a formal, final judgment 194
and so hold to be by the Supreme Court of the United States in the case of the United States v. Kelly, reported in 15 Wallace 82 United States at page 34, and forgave, if you please, or ruled that the effect of that judgment was that it was a certification, a solemn act by the United States, that the service of the Relator up to the time that he received that discharge was honorable.

Now to examine the first. We must pay very careful attention, if your Honor please, to the fact that in the charges annexed to the petition the Relator is charged as a prisoner of war. He is not charged as 195
naval personnel; he is charged as a prisoner of war appointed by the Japanese Army as a petty officer, appointed by the Japanese Army and not by the Navy, in the administration of a Japanese prisoner of war camp by the Japanese Army with having posited the acts which are alleged to constitute the offenses.

Now, I say and we contend that there is no functional relationship at the time the acts were committed in 1943, when the Relator concededly was a prisoner of war, had been a prisoner of war at that time for nearly a year. There was no functional relationship existing between the Navy and the United States and the Relator by which, or under which, he could, on the functional relationship, be compelled to submit to any of the Articles for the government of the Navy.

Now, it does not help to resolve that question to say that he had a dual personality. He did not. He was a prisoner of war. And when you say that he was a prisoner of war you cannot at the same time say that he was Navy personnel.

The Court: I think that is a fallacious conclusion.

Mr. McGurk: I must press it.

The Court: I have read your brief on the point and I wholly disagree with the argument. It is entirely possible for a man to be a prisoner of war and a member of the armed services at the same time. It would be absurd to contend that because he became a prisoner of war he ceased to be a citizen of the United States, for example. Now, if he was still maintaining his status as a citizen of the United States, he, of course, was either of a civilian status or in the armed service. If he was not of a civilian status, his enlistment persisted, and I cannot conceive of the either-or argument which you urge. He was both a Japanese prisoner of war and a member of the Navy.

Colloquy

Mr. McGurk: Do you consider the bifurcation of that argument upon the theory that the treaties I have just enumerated superseded or repealed by implication the Articles for the Government of the Navy? 199

The Court: I cannot conceive that that is such a fact, the treaties to which you referred. Moreover, the treaties, if they have any relevance, would have relevancy only in the event that the Government of Japan called upon the Relater to do something, but he did not fail under the treaties to perform acts for the captive nation. That is not the issue here at all. 200

Mr. McGurk: But those are the acts. You cannot confound the acts with the issue.

The Court: Please let me talk, will you?

Mr. McGurk: I am sorry, sir.

The Court: Now, it is a perfectly conceivable conclusion that if the Japanese Government had this man on the carpet for failure to do that which he was required to do as a prisoner of war under the treaties, why, that would be one thing, but that is not the situation here at all. And whatever defense this Relator had to the obedience that he lent to the captor's orders, I suppose that that was asserted before the court martial. That is not the matter before us at all. It does not affect the jurisdiction of this Court in the slightest degree. 201

Mr. McGurk: I should like to point out my disagreement with your Honor's argument. The Japanese nation did not call upon the Relator to do anything—mark you, to do anything—to conform with the treaties. The treaties prescribed that all prison-

202 ers of war shall be subject to the rules and regulations of the capturing army. Now, they prescribe various kinds of disciplinary procedure. They prescribe for infractions at camp. They call it a disciplinary measure. If the offense is more serious, such as the commission of what we would ordinarily consider a crime, they have judicial proceedings. The judicial proceedings, if they are to be taken against a prisoner of the United States, would have to be notified to the protecting power.

The Court: All of that is a matter that doubtless
203 was argued, if pertinent, before the court martial, but here I refuse to consider it as a point which indicates that there was no jurisdiction in the court martial to try for the alleged offenses specified in the paper annexed to this petition. Your fourth point—

Mr. McGurk: Well—

The Court: I do not want to cut you short.

Mr. McGurk: I understand that.

The Court: Mr. McGurk, the fourth point that you list seems to be the vital issue in this case, and that is the one, narrow in scope as it is, which strikes
204 me as being the turning point of the whole proceeding.

Mr. McGurk: Of course, I want to argue a little more extensively the treaties. There are one or two points I think your Honor has overlooked. For example, the treaties did not provide that so and so shall do anything. The treaties are protective for prisoners of war and cover the whole field. Now, if they cover the whole field, then they exclude the

Articles for the Government of the Navy and they directly affect jurisdiction of the court martial. 205

The Court: I cannot reason that way at all.

Mr. McGurk: Does your Honor hold that the court martial could administer the regulations and rules of the Japanese Army?

The Court: They had no occasion to do it.

Mr. McGurk: Then they had no occasion to adjudicate the treaties excepting to examine and find out whether under the treaties they had jurisdiction.

The Court: I do not know what they did with respect to the treaties. I do know that what the court martial did was to hear certain charges that were made against this man for violation of the Articles governing the Navy. That is the only matter that is before me now: Did the court martial have jurisdiction to hear those charges and make a determination? 206

Mr. McGurk: Your Honor certainly does not hold, as I understand from what you have said up to now, that the court martial had jurisdiction if the treaties occupy the whole field with respect to the adjudication of the rights of prisoners of war. Your Honor does not go that far?

The Court: I say, with absolutely no reservation at all and with no doubt in my mind, that the treaties do no abrogate the Articles governing the Navy. 207

Mr. McGurk: That, of course, could be on one of two grounds. You could overrule me upon the theory that the treaties repealed by implication Section 1200 of U. S. C. A. That is one ground upon which the treaties would be bowled out, but the second ground is the ground on which I would like to have your

208 Honor adjudicate. If this court martial attempted to occupy the field in which there was no jurisdiction because the treaties occupy the entire field with respect to adjudicating the rights of prisoners of war, then I do not see how the court martial could obtain jurisdiction.

The Court: I can see that the court martial acted in preferring charges and in considering the evidence on a basis of dereliction of duty under the articles governing the Navy, specifically the provisions of Article 8. I think you are right in your
209 brief in arguing that Article 14 does not apply: That Article 8 does. I will make the ruling now, if you want it as a matter of record, that when the matter is before the court martial the treaties did not overrule, abrogate or repeal Article 8 of the Articles governing the Navy.

Mr. McGurk: Will your Honor go one step further and hold, unless you want to amplify it and say you do hold by implication, that the treaties do not provide or do not usurp the entire field under which the rights of prisoners of war may be adjudicated?

The Court: I do not think it is necessary for me
210 to hold that, having said what I did just a moment ago.

Mr. McGurk: Does your Honor extend the ruling to that part?

The Court: That would be my view if the issue called upon for decision involved that, and I do not think it does.

Mr. McGurk: You hold, then, that, notwithstanding the treaties and the treaties having usurped the

entire field, that notwithstanding both those propositions, the court martial had jurisdiction? 211

The Court: I certainly do.

Mr. McGurk: In spite of the usurpation of the entire field?

The Court: I do not say there was any usurpation.

Mr. McGurk: Well, occupation of the entire field. "Usurpation" is probably the wrong word. Occupation of the entire field as far as prisoners of war are concerned, briefly, as one of my theses; that the court martial had no jurisdiction because the treaties occupied the entire field. There was no overlapping. 212 There was no overlapping of the jurisdiction of prisoners of war outside the treaties.

The Court: I do not go with you and I decline to sustain the contention.

Mr. McGurk: Coming to the last point, namely, that the discharge received by the Relator on the 26th of March, 1946, under the doctrine of the Kelly case, which is cited all over my briefs, at least was a formal, final judgment which the Government of the United States gave to the Relator attesting to the fact that his service up to the time he received it was honorable. Now, that case, if your Honor is 213 familiar with it, you will recall came up in the Court of Claims. One Kelly, a soldier in the Civil War, during his term of service had deserted. He came back before he was arrested and, to make good the time of his desertion, he served extra time and, therefore, he was not court martialed. However, when the time came for bounty payments, the Army said, "No, you cannot have a bounty payment be-

214 cause you are a deserter." He said, "Well, here is my honorable discharge. I got this honorable discharge after I deserted," and the Court of Claims was with him. The Government appealed the case to the Supreme Court of the United States and, mark you, that happened in 1866, I think, or 1864-1866 if I am not mistaken, and the court in that case adopted the opinion of the Judge Advocate General of the Army, which before that, for how many years I do not know, had been in use by the Army, that an honorable discharge of an enlisted man, as Kelly was and as the
215 Relator here is, was a formal, final judgment attesting that the service of the holder, or the person upon whom it was bestowed, had served the Government with honor.

Now, the facts in this case I do not think can be very much in dispute. The testimony this morning and the testimony so far as the exhibits in the case go shows that Hirshberg was discharged from the Navy on the 26th of March, 1946, at midnight on that day. His enlistment had expired. Now, the physical record, or the health record, which brings up and shows the beginning of the examination of him
216 incident to that discharge, shows that the examination was begun on the 25th day of March 1946 and was finished on the 26th day of March, 1946, and thereafter, although the health record bears the endorsement that he was examined on the 27th of March, 1946 for re-enlistment, mark you, which was one day subsequent to his discharge. He says he was never examined physically for re-enlistment. The record of his shore patrol precinct office, which is in

evidence here shows that between the 26th and the 28th of March, 1946 he was not on duty. For a short period on the 26th of March 1946, when he made an inspection, I think at 1 o'clock in the morning, he was on duty. That was at 1 o'clock in the morning of the 26th. On the 26th day, 12 or 15 hours later, by expiration of the term of his enlistment, which was a contract period, his term of enlistment expired. I mean that is beyond cavil of doubt. I mean the exhibits that have been appended to the respondent's brief show that. I have no quarrel with those exhibits. They show that his enlistment expired on the 26th day of March, 1946 and that the next day, late in the afternoon—Admiral Sprague says so in the affidavit which is appended to the Relator's brief and which I introduced on behalf of the Relator on the hearing this morning—shows that he has been serving since late in the afternoon of the 27th of March, 1946 as an enlisted man, and that since that time his service has been continuous. 217 218

Now, the Navy says that the interval of time is too short, that the Navy had continuous jurisdiction of him, and the continuous jurisdiction of the Navy is based upon the fact that because provisions of the Act of Congress upon which the Articles or rules or directions of the Navy are formulated provide that for continuous service a man shall be eligible to so much longevity and fogy pay and for continuous service pay, he shall have so much more pay at the time he re-enlists at the expiration of a prior enlistment and that he shall have other benefits under the statutes, mark you, and they say that that shows the 219

220 continuous service and from the continuous service there was continuous Navy jurisdiction over him.

However, there is nothing in any of those statutes which confer those benefits which shows that they are for the purpose of giving jurisdiction to a court martial. There is nothing in those statutes which helps the Navy to say that because the statutes confer or coin the phrase "continuous service" the court martial shall have jurisdiction. Those statutes are beneficial to those who fall within the descriptions of the personnel mentioned in them. For example, in
221 the mustering out payment act of 1944, Section 691-b, it is provided that for a person who re-enlists after the expiration of his enlistment, if he re-enlists within 90 days from the time of expiration of his enlistment, he shall receive his entire mustering out pay in one payment. If he re-enlists within 30 days he shall get so much of a bonus. Now, the Relator did both those things. I mean he got his re-enlistment bonus because of re-enlisting within 30 days; he got his entire mustering out pay, because he re-enlisted within 90 days. Now, if the argument or the contention of the Navy is to be based upon the fact
222 of narrowness of time that intervened between the 26th of March, 1946 and late in the afternoon of March 27, 1946, then there is no reason why this Court cannot say, "But will you claim, Navy, that because of the fact he did not wait 90 days, which he might have done under the act, or because he did not wait 30 days, which he might have done under the act, but within the period of both of those times he re-enlisted and got enhanced bonuses, that thereby

—mark you—thereby the jurisdiction of the Navy 223
over him was continuous so as to confer the jurisdiction of the court martial?" Now, that, it seems to me, is the nub of the case, as your Honor said. Was that discharge effective or was it not, and can it now be attacked collaterally?

If the Navy had the right to give it to him, how can this Court go behind it?

In a case that came up from California, United States v. Drainer—it is cited in my brief—the Relator Drainer was a member of the Marine Corps of the United States. He had committed an offense 224
during his enlistment—his prior enlistment we will call it. Thereafter, and after he had been discharged from that prior enlistment, they attempted to haul him up as they have done the Relator here and charged him and convicted him of offenses covered in the Articles for the Government of the Navy, he being a member of the Marine Corps. The District Court, upon a writ of habeas corpus that he sued, dismissed the writ—sustained the writ. The Navy thereupon appealed to the Circuit Court of Appeals for the Tenth Circuit and the Circuit Court of Ap- 225
peals affirmed it. It is cited at page 35 of my main brief, ex parte Drainer, 65 Federal Supplement 410, 411, and affirmed without opinion in 158 Fed. (2d) 98. No application was made by the Navy Department for a certiorari to the Supreme Court of the United States. I ran down the applications for certiorari and there was no application made. Now, that case very expressly holds, as does the Kelly doctrine, that an honorable discharge is a formal,

226 final judgment and, having received that formal final judgment, the offenses that were alleged to have been committed during the enlistment period that had terminated were wiped out.

Now, you cannot touch any of these doctrines that the Navy has put forward, and I am going to read them to your Honor in a moment. Offenses committed during prior enlistment may not be prosecuted in a subsequent enlistment unless during the prior enlistment jurisdiction is attained of the accused. In other words, in my case, in the case of Hirshberg,
227 for the Court to have obtained jurisdiction which would be infallible and beyond attack here they would have dated it the 26th day of March, 1946, or on the 26th day of March, 1946 perhaps have begun to serve upon him the charges so as to put the proceedings in operation so as to have saved themselves, not only from lack of jurisdiction in the event that they let the expiration date go by, but in order to save themselves from the state of limitations.

Now, at pages 37 and 38 of my brief I cite the Chinese case of Fong Chue Chung, 148 Fed. (2d) 904.
228 That was a case that arose out of an application for citizenship. It seems the Chinese in that case had been admitted to this country. In other words, he was not coming in; he had already complied with the provisions of the exclusion law and had been inducted into the United States Army and served and had received a discharge. The discharge he received was an honorable discharge and, in order to facilitate the showing of the character of the applicant for

citizenship, he was entitled to produce anything which 229
would show that he had served honorably. He produced his honorable discharge. Albeit, his honorable discharge bore the notation that he was not eligible for further re-enlistment or induction. The District Court held that the provision of the statute which held that your term of service must be shown as honorable service, that the honorable discharge did not meet that requirement, that honorable discharge from the Army was not the equivalent of the statutory phraseology "service with honor" and denied him citizenship. The Circuit Court of Appeals, however, 230
in 149 Fed. (2d) at page 905, reversing the District Court, held "We hold that the expression in the certificate to wit, 'honorably discharged', 'discharged from military service', 'certificate is awarded as a testimonial of honest and faithful service to his country', bring the certificate holder within the beneficial scope of the statute which requires that the alien shall have 'served honorably.' It is our own opinion that the District Court was without jurisdiction to go back of the discharge order upon the subject of petitioner's service while he was in the 231
Army."

Now, I said a moment ago you could not go beyond that. It could be attacked, of course, for fraud. It could be attacked like any other judgment, but to this case it is important because it holds that the District Court could not go behind it. It could not go behind it and construe it. And there was no friendly attack made on it.

232 Now, there is another case cited by me on page 38 of my brief, CMO-2-1947, page 28. Now, Judge, 1947 is an important date that we ought to keep in mind. This is a court martial order. It is an order that came down probably from the Judge Advocate General of the Navy, but at least it bears the imprimatur of the Navy Department of the United States. The accused in that case enlisted in the Navy on the 3rd day of April 1941. A month later he deserted. On September 9th he enlisted under an assumed name in the Navy. On October 8, 1943 he
233 received an honorable special order discharge. On April 8, 1946 he was convicted by a court martial for the May, 1941 desertion. The conviction was set aside on the following grounds. "Although the facts stated in the second enlistment application were false and intentionally deceitful and the enlistment was itself fraudulent, nevertheless, the discharge of the accused operated to sever his connection with the naval service and the court martial had no jurisdiction over the person of the accused to try him for the offense here preferred."

234 Now, there is another case which is even closer to the case I have put than that, on page 36 of my main brief, CMO-1-1926, page 9. Bahen was the name of the accused there. It is the second paragraph on that page 36. Bahen was convicted by general court martial for an offense not cognizable under Article 14, which is the one you and I just spoke about. It appears that on March 31, 1925 his term of enlistment expired and he was honorably dis-

charged. It was during that prior enlistment then 235
expiring on March 31, 1925, that the offenses of which he was convicted were committed. Now, this is the important point. On April 1, 1925, one day after his honorable discharge, which is on all fours with the case we have here, he re-enlisted for four additional years. He was brought to trial on May 22, 1925, a little over a month later, and convicted. The conviction was set aside because the court lacked jurisdiction.

Now, the cases are all the same. I mean there is a homogeneity about them all which is tiresome 236
until I come to one point.

The Court: Where can I get the CMO?

Mr. McGurk: Are you a member of the Bar Association of the City of New York?

The Court: Yes, I am.

Mr. McGurk: You can get them there.

The Court: I have been for 47 years.

Mr. McGurk: I have been, but not quite for 47 years. You may get them there, sir. Now, I never put great store in Colonel Winthrop's work on Military Law and Precedents. I think it is all right as 237
far as it goes, but, like all glossaries, it does not go far enough. On page 37 in my brief I state what Colonel Winthrop thinks and holds of a jurisdiction acquired after an honorable discharge. I am not going to burden you with reading that, but I will take this excerpt out: "Putting out of question the question of offenses the amenability for which is expressly defined by the 60th Article, it is the opinion

238 of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civilian status at which the military jurisdiction properly terminated, the United States (while it may, of course, continue to hold him liable for a pecuniary deficit) must be deemed in law to waive the right to prosecute him before a court martial for an offense previously committed but not brought to trial. In this view, a subsequent reappointment or re-enlistment into the Army would not revive the jurisdiction
239 for the past offenses, but the same would probably be considered as finally lapsed."

Now they put more store by the old Colonel, and I have never had the pleasure of meeting him, but, as I say, I do not put much confidence in glossaries, and Colonel Winthrop's book is a glossary. In the memorandum of the convening authority, Admiral Kelly's memorandum bearing date August 29, 1947, which is in evidence here, we find a discordant note. Instead of the usual Kelly doctrine, we find the first evasion, as I have described it in my main memo-
240 randum, of the effect of the Kelly doctrine. Admiral Kelly says, sustaining the findings of the court martial, and on this question you will find the same thing, sir, in the respondent's main brief, at page 22 of the respondent's brief—"In addition, the latest pronouncement on this question by the Judge Advocate General of the Navy, court martial order 7, 1938, page 42, expressly holds that since an accused was subject to Navy law at the time of his offenses

and also at the time of his trial, the fact that he was 241
in the meantime out of the naval service"—that is a very important departure there—"the fact that in the meantime he was out of the naval service is not a sufficient reason for denying jurisdiction over his person and the offenses with which he was charged," citing ex parte Joly, 290 Fed. 858, a decision by my old friend Judge Mayer, whom I am sure your Honor knew.

Now, you will note in the respondent's brief at page 22, among the decisions of the court martial orders upon which that doctrine is based, aside from 242
the Joly case which is reported in the Federal Reporter, was cited Section 334 of Naval Courts and Boards as sustaining that doctrine. Now I should like to call your Honor's attention to the fact that Naval Courts and Boards, while it may be cited there, is erroneously cited, to put the most charitable interpretation upon it that I can, but it has not and never had the force or effect that is now contended for it. For example, in the book—I am now referring to page 13 of my answering brief, at the foot of the page, the last paragraph on the page, beginning 243
"Nevertheless"—well, going down to the second sentence in that paragraph: "In a manual put out by the Navy, styled 'Naval Courts and Boards,' which is the initials of which appear on page 22 as sustaining the Section 334 doctrine, we find Section 334 in the last line but nine appearing at page 192 thereof. It provides in part: "The mere expiration of the period of enlistment of an enlisted man, without the

244 occurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offenses committed during the period of enlistment." That rule, embraced as stated in Section 334, was interpreted in 1942 at page 191 of CMO-1 as follows, and it is a very important thing and it seems to me it knocks the props right from under 334 and the court martial confirmation. Interpreting that section, the Judge Advocate General said, "Likewise, Section 334, cited by the convening authority does not apply
245 as it specifically refers to offenses committed during the period of enlistment. Furthermore, no military jurisdiction had attached prior to the expiration of enlistment which could be continued thereafter by a court martial. It can be held, therefore, that the court erred in not adhering to its acceptance in the first instance of the accused's plea in bar."

Now, that is on all fours with the case at bar here. When Hirshberg was before the court on the charge of which he was convicted there was a plea in bar made upon the ground that the honorable discharge that he received on the 26th of March 1946 was a
246 formal, final judgment and that because thereof and the fact that the prosecution for the offenses had not been begun until, as he testified this afternoon, until the 24th of February, 1947, in the period of his current enlistment. Mark you, they did not obtain jurisdiction of him in the prior enlistment, but in the current enlistment. Then they lacked jurisdiction.

Now, it is useless to try to improve upon that

language. But on page 22, as I said before, they 247
cite our friend Judge Mayer's opinion in 290 Federal at 858 in the matter of Joly. Now, I adverted to that in my main memorandum—

The Court: I looked at the Joly case and it seemed to me that the thing we are interested in in this proceeding was passed over in that case. Judge Mayer refers to the hiatus, but determines the matter before him without any conclusion as to what the effect of that hiatus was.

Mr. McGurk: I looked at the record, if your Honor please, since my main brief was written. I looked 2 8
at the record of the United States District Court for the Southern District of New York. I have appended on page 14 the results of my findings, page 14 of my answering brief. I give the file number there, if your Honor cares to find it, or if the United States Attorney would care to look at it.

There are only two ways of examining the Joly case based upon that record. Joly was convicted of violation of the 94th and 95th Articles of War. The 94th Article of War is similar to Article 14 of the Articles for the Government of the Navy. Now, the sentence of the court, as shown by the return, 249
appears to be concurrent. I mean he was sentenced to pay a certain fine, and I think he was sentenced to pay a fine and also to be imprisoned for a period of five years. I think they sent him to Leavenworth. When the convening authority got hold of it they reduced the sentence to two years, but still they did not apportion the Joly sentence between the two

250 articles. Therefore, it seems to me that Judge Mayer was driven to dismiss the writ because, even though Joly was then out of the service—and Mayer says he was out of the service—even though he was out of the service, there is nothing, as I said, to indicate the punishment, the prison term, was allocated or divided between the 94th and 95th Articles of War. Judge Mayer had to dismiss because the court martial had jurisdiction under the 94th Article of War. It is unfortunate the case did not go up. If there had been an allocation of the punishment between the
251 94th and 95th Articles of War, Judge Mayer still would have had to dismiss the writ because he could not say—Joly could not come in to court and say he was illegally detained under the 95th Article of War until he has lain out the sentence imposed upon him under the 94th Article of War. That is, assuming the sentences were consecutive. He could not get a writ on the 95th Article of War, which does not survive until he had begun or was threatened with serving the term imposed on that. They have both horns of a dilemma. They were concurrent and Judge Mayer couldn't do anything but dismiss, be-
252 cause there was jurisdiction. If they were consecutive and the sentences had been apportioned or there had been a separate sentence for each, then he would still have had to dismiss because under the 94th Article of War they say, "Joly, go to jail until you have served that time."

The Court: I don't think the Joly case is going to help me at all.

Mr. McGurk: I don't think it is going to help the 253
Navy either. I don't think it helps the Navy. However, they have seen fit to cite it. Now, the United States, or the Navy,—and when I say "United States" or "Navy," I agree with the Navy in that respect—says that an enlisted man's service in the armed forces, whether it be the Army or the Navy, and the Navy here, is governed by that contract of enlistment. I don't have any quarrel with that at all. It is governed by that contract of enlistment. A contract of enlistment governs his relationship to the Navy. But they come along with the strange doctrine that 254
they want to construe the terms of Article Second of this contract to be retroactive, to go back from the 27th of March 1946, when he entered into it, rather than forward, or prospective.

Now, I am the last one to deny that the terms of a contract must be provided in the instrument itself, that they shall be retroactive, but there is nothing in this contract which so says and there is no room in the God's world for construing from the terms that this contract was retroactive. For example, they say these terms are retroactive: "I oblige and 255
pledge myself to serve four years from the 27th of March," notwithstanding the ablative of separation, "from the 27th of March, 1946, unless sooner discharged by proper authority and on the conditions provided by the acts of Congress of March 3, 1875," which is printed in fine print. They say those things, that provision, should be made retroactive to cover the hiatus that existed between the expiration of his

256 enlistment at midnight on the 26th of March, 1946 and late in the afternoon of March 27th, when this contract was signed. Now, I say that is heresy. I say that is absolutely schismatic.

The Court: Mr. McGurk, I do not want to hurry you.

Mr. McGurk: Am I going to be interrupted? I should not like to be interrupted.

The Court: If you want to finish this argument—

Mr. McGurk: This is my last point and then I have one request and then I am finished. Then I

257 shall sit down. In 13 opinions of the Attorney General, at page 278, the Attorney General advises: "A volunteer soldier is not discharged until he is released from military control and from subjection to the orders of his superior officers. This did not take place until his discharge certificate was given him, and accordingly not until that time can he be deemed to have been honorably discharged."

Now, that is right in line with the doctrine of the Kelly case. It is right in line with the settled policy of the Navy in separating enlisted personnel from it. If this man was discharged, that is one

258 thing. If he was not discharged, that is another. But I submit, sir, that under the rules he was discharged. Now, the Navy itself, in its rules, provides, instead of giving the man, as I interrogated him this morning, a certificate that he could frame and hang up for his posteriority to look at, they, on November 17, 1942 provided, and that is to be found in Navy Department Bulletins Cumulative Edition 31 of De-

cember, 1943, published by the Navy Department 259
at page 664. Here is what it says:

"1. To reduce the clerical load of the forces afloat and the shore establishment, and to conserve the supply of discharge forms, commanding officers will discontinue the preparation and award of discharge certificates for the duration of the war in all cases where regular Navy men are discharged for the purpose of re-enlistment immediately under the provisions of Reference (a).

260

"2. Entries in service records on discharge, as now required by current instructions, shall constitute the only form of discharge required to authorize immediate re-enlistment.

"3. This procedure does not apply to men who are permanently separated from the naval service, in which cases the appropriate certificate of discharge shall be prepared and delivered to men on discharge.

"4. In all cases of discharge with immediate re-
enlistment, the new shipping articles shall accompany 261
the closed out service record when forwarded to the Bureau. The new shipping articles should not be inserted within the closed out service record, or in the pocket thereof, but should be fastened securely to the cover of the service record in such a manner as to insure that the two documents do not become detached.

"5. The provisions of this letter are not applicable to enlisted men of the Naval Reserve whose enlistments were extended by Reference (a) for a period of not later than six months after termination of the war."

Enclosure A provides: "Enlistments of men in the regular Navy who do not voluntarily extend or reenlist are hereby extended in accordance with Act approved December 13, 1941, for a period of not later than six months after termination of war."

No application to us. "Men so detained not entitled to enlistment allowances. No change in present law governing payment of enlistment allowance to men who voluntarily re-enlist or extend enlistment in regular Navy."

Now, I should like to just call your Honor's attention to the question of the construction placed upon a contract of enlistment by the Attorney General of the United States. I have it here, if your Honor will bear with me. I realize that the time is running out on me and I am awfully sorry, because this is very important. It is at page 39 of my main brief. In 15 of the opinions of the Attorney General, at page 152, citing from page 161 thereof: "Enlistments in our service are required to be for the term of five years. This engagement binds the soldier for a specific term of service, beginning at a certain time and running thence continuously day after day until the end is reached, the last day of the term being as much fixed by the contract as the first. Consequently, unless there exists some law when the con-

tract is entered into providing for a contingent prolongation of the term beyond the period fixed by the latter, and the contingency happens within the term, or unless the soldier before the term is up consents to an extension thereof, with the last day of the term his engagement necessarily expires, and with the expiration of his engagement the obligation to serve thereby imposed is also at an end. And this would seem to result as well where there has been an infraction of the contract by desertion or otherwise as where it is fully performed." 265

There is just one other thing I would like to call your Honor's attention to, and that is that the Relator cites a case which has been overruled. He cites the case of Rosborough v. Rossell, 56 Federal Supplement 347. That case was overruled in 150 Federal (2d) at page 809—page 18 of my answering memorandum. 266

The Court: What is the citation of C. C. A.?

Mr. McGurk: 150 Federal (2d) 809. It is overruled on the very point for which he cites it. On the same page Relator cites the case of a volunteer soldier Sackville-West which, by the opinion of the Attorney General, has been confined to the very facts upon which Sackville-West, which is an English case, was adjudicated. We refused to adopt it. We pointed both of those out, sir, at page 18 of my answering memorandum. Now I should also like to call your Honor's attention to the very recent case of Captain Durant of the WACS. 267

The Court: Have you a copy of Judge Mayer's opinion?

268 Mr. McGurk: No, but I will give you this. I thought the United States Attorney would have a copy made for you. I will give you mine.

The Court: You do not have to recite the facts.

Mr. McGurk: I just want to call your attention to two facts about Captain Durant's case. Those two facts are that it reaffirms the doctrine which I have contended for and which has been time honored, namely, the doctrine of the Kelly case in 15 Wallace. It also has a very close analogy to the case at bar because Captain Durant was arrested on the day im-
269 mediately preceding the expiration of her terminal leave. Her terminal leave was to expire on the 31st of May, 1946. Captain Durant was placed in durance vile at 2 o'clock a. m. on the 29th of May, one day before she was entitled to receive her certificate of discharge. The same thing happened here, by analogy. We are claimed to have been continuously in the military service. The only distinction between the Durant case and the case at bar is this: Captain Durant was on terminal leave and, as a sailor on terminal leave, they said she was on inactive duty
270 and, because of that inactive duty, she was not amenable to court martial. Now, we are clear of any kind of duty between midnight of the 26th of March, 1946 and the 27th day of March, 1946. I mean there is no claim we were on duty then. The record of the precinct shore patrol shows that we were not on duty.

The Court: I think you have made that entirely clear to me, Mr. McGurk.

Mr. McGurk: Now, there is just one request I have before I sit down and that is that this case, if this writ of habeas corpus is dismissed against this Relator, then I ask your Honor to stay all the proceedings for a period of two weeks to give the Relator an opportunity to file his appeal in the Circuit Court of Appeals or the Supreme Court, as he may be advised, and if within those two weeks—I have included this in both of my memoranda—if within those two weeks he does that, then I ask that it be further stayed until the mandate of the appellate court comes down and an order is entered theron and served with notice of entry. 271 272

The Court: You may be anticipating trouble, Mr. McGurk.

Mr. McGurk: I do not want to anticipate trouble. I just want to avoid it by calling your Honor's attention to it. I hope the occasion never arises.

The Court: I think we will cross that bridge when we come to it.

Mr. McGurk: Your Honor won't overlook it so that I won't have to go racing around to keep him within the jurisdiction? 273

The Court: No. Now, Mr. Keogh.

Mr. Keogh: May it please the Court, in view of the fact that several early points of Mr. McGurk have been resolved, I should like to emphasize the last one. I feel forced to refer to the Hague and Geneva treaties.

The Court: Do you want me to revise my opinion about the effect of them?

274 Mr. Keogh: No, sir, but I should like the record to show that Japan in no way ratified any of them and, therefore, that whole point should fall.

Mr. McGurk: But that is not a fact.

The Court: He did not interrupt you.

Mr. McGurk: That is a glaring error.

The Court: Please do not interrupt Mr. Keogh.

Mr. McGurk: I am sorry sir.

Mr. Keogh: We have before us the question as to whether the period of time which was so effectively brought out this morning by the Relator himself,
275 namely, the period from midnight of March 26, 1946 to late in the afternoon of March 27, 1946, is such as to cause the court martial to have lost jurisdiction of this offense. The Navy holds that it had jurisdiction over the Relator at the time the charges were filed against him and over his person at the time the offenses were committed. We say that it had jurisdiction at the time the charges were filed, quite in distinction from the Durant case. I want to have the record show that I go along with the intent of Congress in all of its legislation on this subject;
276 that it was the intent of Congress to prevent the military at any time from reaching out into the civilian population, bringing somebody in charged with a military offense and trying him by court martial. Of course, the Constitution is very plain on that. I subscribe to it and my argument does not rest upon that point.

We heard about the Kelly case. Now, the Kelly case is easily distinguished from the one at bar. In the Kelly case the Army allowed him to make up

the time in which he was AWOL and brought no charges against him. It was with the consent of the Army that Kelly was allowed to make up that time. Therefore, it is not the same as the case at bar for the reason that the honorable discharge, as far as Kelly was concerned, was a complete and honorable discharge and no offense that had been committed before his discharge was the subject matter of court martial. We agree with the holding in the Kelly case, but have to state that it does not apply herein. 277

I should like to emphasize the importance of the enlistment contract which has been referred to. We in no way seek to say that it is retroactive, but the enlistment contract is not any ordinary contract. It might be more closely analogous to the marriage contract. The status of the individual changes completely and, according to the terms of the contract, he definitely—to read from it: "I also pledge myself during such service to comply with and be subject to such laws and regulations and articles for the Government of the Navy as are or shall be established by the Congress of the United States." 278

Now, we say again that the Navy in the case at bar had jurisdiction of the Relator and had jurisdiction of the offense, whether, as your Honor so well put it, he was in the capacity of a prisoner of war or any other capacity; that the conditions the war might necessarily produce is of no importance; the Navy had jurisdiction over him. 279

The Court: Well, Mr. Keogh, perhaps we could crystallize the argument if I point out to you that

280 I find a certain inconsistency between point 1 of your brief, in which you contend that his enlistment in the naval service of the United States constitutes a contract and it has been so adjudicated. Now, if any enlistment is a contract, that contract by its terms expired on a certain date, to wit, the 26th of March, 1946, at midnight. Then the enlistment on March 27, 1946, was also a contract. But I have difficulty in reaching a conclusion that the enlistment on March 27, 1946 was anything other than an independent contract. It seems to me that to bring about a
281 dismissal of this writ and holding that the court martial was with jurisdiction you have got to show there was an extension of the first period of enlistment by virtue of the so-called re-enlistment, and I also find difficulty on that question because of the shortness of time. Whether it was one hour or two hours or a week or a month, if this Relator acquired as a result of the discharge civilian status and if the re-enlistment did not act as an extension of the enlistment that expired at midnight of March 26, 1946, why, I think you have a serious burden there
282 and I would like to be informed carefully as to what your contention is.

Mr. Keogh: Yes, sir. We hold that the contract of enlistment was for a given period. We do not seek to have one grow out of the other. We say, however, where the period of time was as short as this one actually was, or even greater, the Navy did not seek to assert its jurisdiction over the Relator during the hiatus, nor does the contract contain a clause saying that at the termination of the enlist-

ment there will be a pardon for any offenses committed during a particular enlistment period which has not been discovered or made the basis of charges during the re-enlistment. 283

The Court: That would be unnecessary in the light of the honorable discharge on March 26th. That would not be required. You see, here is the point: You say that the Navy acquired jurisdiction over the Relator as a result of the enlistment on March 27th. Of course, that is so. But does it follow that by virtue of acquiring jurisdiction over the person the Navy also required jurisdiction to determine whether the Relator was guilty of the crimes with which he was later charged? 284

Mr. Keogh: That we would maintain unless he had been pardoned for crimes that had been committed but not discovered or made the basis of charges against him. But, more important, that would vitiate the need for a statute of limitations if the same thing applied.

The Court: No; because you have a very clear provision in Article 14 which does not appear in Article 8.

Mr. Keogh: That is very true, and for that reason I pressed submitting Exhibit 2 this morning for the reason that that was not a diversion from the policy of preventing the military from reaching into the civilian population, but because of the historical circumstances of the passage of that statute— 285

The Court: Why did it have to be incorporated in Article 14?

Mr. Keogh: I think that the hearings in the Senate indicated that, because the fraud that was so

286 rampant at the time of the Civil War made it necessary for the military at the time to have jurisdiction given to it by special legislation over the individuals who, through business contacts, and so forth, were practically an arm of the military.

The Court: It is a curious situation because Article 14 lists the nature of the offenses and Article 8 does not, and yet the particular charges against this Relator were of a mean and contemptible variety of crime charged against him and concerning which he was found guilty by the court martial. Yet we
287 search Article 8 for some indication which would give jurisdiction even over such a crime if once the Relator acquired civilian status. Now, there is the whole case, Mr. Keogh. I think that I shall reserve decision on this whole matter and give that the fullest and most careful study to determine whether there is a diversion because of the Navy's acquiring jurisdiction over the person and whether that carries with it jurisdiction over the crimes that were committed in the prior enlistment concerning which he received an honorable discharge. That is the nub
288 of the whole case.

Mr. Keogh: I agree with you on that, sir, but I have not quite answered the premise that you put forward.

The Court: Yes.

Mr. Keogh: I think that there is a bit of confounding in the statements made by your Honor of whether the Relator was in fact, at the time that the charges were served on him, a civilian, or whether between the period of the offense and the time he

was charged with the offense he has for a short period enjoyed the status of a civilian. 289

The Court: Oh no.

Mr. Keogh: Now, that does not change his actual status.

The Court: Certainly not. It is quite clear that when the charges were prepared the Navy had jurisdiction. That is conceded.

Mr. Keogh: And even on the basis of an enlistment contract there would be nothing, as I say, in the nature of a pardon. The discharge and the re-enlistment is a routine matter. The commanding 290 officer, for instance, might issue the discharge and he might accept his re-enlistment and might have had him for two or three hours or two or three days. Certainly neither the law nor the Articles for the Government of the Navy would assume that because that individual under whose command he happened to be for a short period of time did not know of offenses committed during the prior enlistment period was giving him a pardon. And so I go on further and argue that the only one, according to our Constitution, who can in fact grant a pardon would be the 291 President and, furthermore, there can be no indirect or by-operation-of-law type of pardon. So termination of the enlistment period does not bring with it that characteristic.

The Court: Suppose this Relator had not re-enlisted?

Mr. Keogh: We have agreed to that.

The Court: To that, of course, you agree that the court martial would have been bound by the

honorable discharge and could not have entertained the specifications of offenses that were filed?

Mr. Keogh: Yes, sir. There is much law and many cases there. We mention that on page 20. I do emphasize, however, the importance of considering in these enlistment periods, not as a vacuum in and of themselves, but the actual fact that maintains is that, although we heard this morning, not having the benefit of a jury we cannot pass upon the reaction that his testimony might have, that for a period of several hours he wore a civilian suit. Would that deprive the Navy of the right to try him for the blotting of the escutcheon which he maintains in one of the memos which he has now brought in.

The Court: Suppose he re-enlisted for a period of a year. Would the re-enlistment, at the end of that time, work the same effect as you contend?

Mr. Keogh: That would depend on the circumstances, I think, that are brought out. If in any way, no matter how subtle or indirect, the military tries to accomplish what it has not the right to do, I say it would not have jurisdiction of the Relator. Now, if according to your hypothetical facts the year was a sufficient period in which the military find out that he had committed these offenses some time before, if the statute of limitations had not run on them and he had voluntarily returned to the service, I say yes, it would have had jurisdiction. And that is why I emphasize, whether this be for eight or ten or 12 or 15 hours, or, as your Honor has suggested, a year, it does not change the basis of our argument. The Navy, I say, had jurisdiction over the individual at the time the charges were filed and served on him

and had jurisdiction over the offense at the time it was committed. 295

The Court: That second point is the point to be established. Now, I do not think we gain anything by repeating the argument. I shall reserve decision. If either of you cares to submit any further brief or memorandum, confining perhaps your discussion to that issue alone, why you may do so.

Mr. Keogh: If I may ask you, your Honor: This morning, just before the calendar was called, I received a very impressive so-called answering memorandum from the Relator. I have not had an opportunity yet to read it. I should like an opportunity to do so. I do not say I shall reply to it, but I would like an opportunity, if I need it, to reply to it. 296

The Court: How long a time do you want to do that?

Mr. Keogh: Since today is Wednesday, may we have until Tuesday of next week?

The Court: Certainly.

Mr. McGurk: Will your Honor take the exhibits of the Relator?

The Court: Leave them with the clerk, and also your exhibits, Mr. Keogh. 297

I hereby certify that the foregoing is true and accurate transcript from my stenographic notes in this proceeding.

DANIEL F. MURPHY
Official Court Reporter
U. S. District Court

Relator's Exhibit 1

298 ND3/A17-20
DHq-232 (10429)
BBL: tc

HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N. Y.

AUG 29 1947

299 DISTRICT GENERAL COURT MARTIAL ORDER No. 451-47.

1. From 21 July 1947 to 12 August 1947, Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, was tried by general court martial at the New York Naval Shipyard, Naval Base Station, Brooklyn, N. Y., by order of the Commandant, Third Naval District, on the following charges and specifications:

CHARGE I: MALTREATMENT OF A PERSON SUBJECT TO HIS ORDERS (4 specifications).

300 CHARGE II: CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE (4 specifications).

CHARGE III: ASSAULTING ANOTHER PERSON IN THE NAVY (1 specification).

FINDINGS: The court found Specifications 1 and 3 of Charge I proved and that the accused was of Charge I guilty. The court found Specifications 2 and 4 of Charge I and the specifications of Charges II and III not proved.

and that the accused was of Charges I and III not guilty; the court did therefore acquit the accused of Charges II and III. 301

SENTENCE: The court sentenced the accused to be reduced to the rating of apprentice seaman, to be confined for a period of ten (10) months, to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence as prescribed by section 622, Naval Courts and Boards. 302

2. The convening authority this day placed the following remarks on the record in this case:

"The record of the proceedings in the trial by general court martial of Chief Signalman, Harold E. Hirshberg, U. S. Navy, has been carefully reviewed.

OBJECTIONS TO CHARGES AND SPECIFICATIONS

At the commencement of the trial the accused objected to the charges and specifications on various grounds. Since 303
the court found that seven of the nine specifications were "not proved", and, accordingly, acquitted the accused of Charges II and III, only the objections to Specifications 1 and 3 of Charge I, and to that charge itself, will be considered.

The accused contended that Specifications 1 and 3 of Charge I did not properly support the charge of "maltreatment of a person subject to his orders", under Article 8, paragraph 2, of the Articles for the Government of the

304 Navy. The accused argued that such offenses should have been charged under paragraph 3 of that article, as, "striking another person in the Navy".

It is the position of the accused that since the specifications alleged that he was serving as a petty officer in charge of a work section "pursuant to appointment by Japanese authorities", that he was not under the military control of the United States and that the two members of the United States Navy who were allegedly maltreated by the accused were not subject to his orders.

305 In the opinion of the Convening Authority the court correctly over-ruled these objections and found the specifications to be in due form and technically correct. The accused was a petty officer of the United States Navy and the senior in rating to the two other petty officers of the Navy, Gaboury and Welch, whose maltreatment was the subject of Specifications 1 and 3 of Charge I, respectively. The mere fact of the imprisonment of these men by the Japanese could in no way divest them of their status as enlisted personnel of the U. S. Navy; neither could it relieve the two junior petty officers of their duty of obedience to the orders of the accused as their senior petty officer. The additional authority granted him by his Japanese captors was 306 merely a recognition and a reinforcement by them, and for their own purposes, of his military authority over other U. S. Navy personnel. It did not serve to supplant such authority.

PLEA TO THE JURISDICTION

The accused also made a plea in bar of trial denying the jurisdiction of the court to try him on the grounds that:

Relator's Exhibit 1

(1) The United States Navy exercised no jurisdiction over 307
him while he was in the status of a prisoner of war, and; (2) that he has been awarded an honorable discharge from the United States Navy on 26 March 1946, after the commission of the alleged offenses and after they must have been known to naval authorities.

In the opinion of the Convening Authority the contention of the accused as to the first named ground can not be sustained.

The foremost authority on the subject of military law states (Winthrop's "Military Law and Precedents" (2nd Ed.) pages 91 and 92) as follows: 308

> "So a prisoner of war, though not subject, while held by the enemy, to the discipline of his own army, would, when exchanged or paroled, be not exempt from liability for such offenses as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status."

Similarly, Section 331 of Naval Courts and Boards, which must be considered as binding upon the court and upon the Convening Authority, lays down the following rule as to the jurisdiction of a General Court Martial: 309

> "Jurisdiction as to place.—The jurisdiction of a naval court martial, except for the offense of murder, extends not only to every part of the United States but also covers all offenses of which it is authorized to take cognizance committed by persons in the Navy, whether within or beyond such territorial limits."

310 Finally, General Court Martial Order 425, War Department 1865, upheld the conviction of a Union officer tried for an offense against a brother officer while both were confined in a Confederate prison at Danville, Virginia. See also Opinion of the Judge Advocate of the Army, R.11, 351, Dec. 1864; p. 48, 52 Jan. 1891; 64 Feb. 23, 1894; C. 13517, Aug. 14, 1903. As stated above, the Convening Authority considers that the court properly had jurisdiction as to the offenses.

There remains the question of whether the court properly had jurisdiction of the person of the accused. It is his con-
311 tention that Article 14 of the Articles for the Government of the Navy enumerates certain specific offenses, all grounded in acts tending to defraud the Government, and that jurisdiction of the person of the offender can survive the discharge only in those enumerated offenses; that Paragraph 11 of said Article 14 provides as follows:

> "(Trial of offender after discharge).—And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall con-
> 312 tinue to be liable to be arrested and held for trial and sentenced by a court martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed (R.S., Sec. 1624, art 14)."

The accused argued that, since the offenses alleged against him do not fall within any of those of a fraudulent nature so enumerated, the Navy has no jurisdiction of his person after his honorable discharge.

Relator's Exhibit 1

The Convening Authority is of the opinion that this contention of the accused must also be denied. Section 334 of Naval Courts and Boards, which must in the absence of higher judicial interpretation by the U. S. courts be considered binding upon the court and upon the Convening Authority provides as follows: 313

"If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the naval service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. Except for offenses provided for in Article 14, A.G.N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in Article 14, A.G.N." 314 315

316 In addition, the latest pronouncement on this question by the Judge Advocate General of the Navy, Court Martial Order 7, 1938 page 42, expressly holds that since an accused was subject to Navy law at the time of his offenses and also at the time of his trial, the fact that he was in the meantime out of the naval service, is not sufficient reason for denying jurisdiction over his person and the offenses with which he was charged. Cited in this connection is the case of Ex parte Joly, 290 Fed. 858, and GCM Records Nos. 75740, 76425, 77457 and 78075.

317 Furthermore, in actual fact the accused was not separated from the Navy. He received a Continuous Service Certificate which conferred upon him all of the benefits of such continuous service. He was never in a non-pay status. Upon signing the Shipping Articles for reenlistment on the day following the receipt of his honorable discharge he expressly obligated himself as follows:

> "I also oblige myself, during such service, to comply with and be subject to such laws, regulations, and Articles for the Government of the Navy as are or shall be established by the Congress of the United States or other competent authority".

318 While it has been held upon occasion that an honorable discharge is a formal final judgment passed by the Government on a man's entire military record (U. S. vs. Kelly, 15 Wall 34; U. S. vs. Landers, 92 U. S. 77), it has never been held that a discharge operates as a pardon of an offense committed during the enlistment. Such pardoning power can only be vested in the President alone. (Constitution, Art. II, Sec. 2, Cl. 1), and can not be affected by the routine

administrative act of a subordinate officer in granting a discharge. 319

Accordingly, the Convening Authority is of the opinion that the court acted correctly in retaining jurisdiction of the person of the accused. In any event the rights of the accused in this respect will be most thoroughly explored and finally determined by the United States Courts, in proceedings now pending in the United States District Court for the Eastern District of New York in which the accused has secured a writ of habeas corpus.

REVIEW OF THE EVIDENCE AND OBJECTIONS THERETO 320

During the course of the trial a great number of objections were interjected by both the judge advocate and the accused on the admissibility of certain evidence. As in the matter of the objections to the Charges and Specifications, the Convening Authority will confine his review to those arising under Charge I and Specifications 1 and 3 thereunder.

The review of the record disclosed that very early in the trial the arguments of the judge advocate and of counsel for the defense indicated to the court that a major element in the case would be the issue as to whether or not the alleged acts of the accused were committed "without justifiable cause". The matter of "justifiable cause" inevitably raised, as a material issue, the motives under which the accused acted. For this reason the court properly exercised a wide latitude in permitting the introduction of collateral evidence as to other and unspecified acts. In arriving at a decision as to "justifiable cause", it was necessary for the court to be thoroughly advised as to the condition of mental 321

322 strain, material conditions of existence and upon the existence of a common plan. In the opinion of the Convening Authority such evidence was properly admitted as being entirely material and relevant to the issues. Similarly, no material errors prejudicing the accused appear to have been committed by the court's rulings upon the many specific objections interposed.

The accused in his testimony admitted the commission of the acts set forth in Specifications 1 and 3 of Charge I, but he assigned a different motive to the commission of such acts, and asserted that they were justified and for the bene-
323 fit of the men against whom he acted, as well as for other prisoners. By its findings the court has denied these contentions of the accused and, in the opinion of the Convening Authority there is ample evidence to sustain such findings by the court. The evidence indicates that the standard of conduct of the accused, and what he considered "justifiable", were inferior to what should have been those of a person of his rank and position under the circumstances.

ACTION OF CONVENING AUTHORITY

No recommendation of clemency was made by the court
324 and the Convening Authority has taken this into consideration in failing to mitigate the sentence. Accordingly, the proceedings leading to the acquittal of the accused of Charges II and III and of the proceedings leading to the findings of Not Proved to Specifications 2 and 4 of Charge I are deemed to be legal.

Subject to the foregoing remarks, the proceedings, findings, and sentence of Specifications 1 and 3 of Charge I and of Charge I itself are approved.

Relator's Exhibit 1

The U. S. Naval Re-Training Command, Naval Station, 325
Norfolk, Virginia, is designated as the ultimate place of confinement, but until the final determination of the judicial proceedings now pending in the U. S. District Court for the Eastern District of New York, the Third Naval District Brig at the U. S. Naval Receiving Station, Flushing Avenue, Brooklyn, New York, is designated as the place of confinement."

MONROE KELLY
Rear Admiral, U. S. Navy,
Commandant, Third Naval District. 326

A True Copy. Attest:

William F. Lally

WILLIAM F. LALLY
Comdr., USNR

327

Relator's Exhibit 2

328 (COPY)

223 29 64 Name: HIRSHBERG, Harold Edward
(Service No.)

CSM (PA)
(Rate) (Pay per Month)

CONT SER CERT No. 169369 ISSUED & SE 5 MAY 1947.

Date: 27 March 1946 First Enlistment
(Day) (Month) (Year)

Reenlistment X in the United States Navy
For 4 years; Minority
Accepted at: Shore Patrol, 3ND, NY, NY.
329 Enlisted at: on board
Occupation: Mariner *Citizenship: W-US

Place of Birth: Brooklyn, N. Y. Date of Birth: 18 May 1918
Home Address: 1934 E. 34th Street, Brooklyn
(Street and Number) (Town)
Kings New York Name of Next Kin or Legal
(County) (State)
Guardian: Marie Hirshberg Wife
(Relationship)

Address: 1934 E. 34th Street, Brooklyn, New York
Married X Single
330 Credited to Congressional Distfrict, State of New York
Education: Grade School: 8 yrs.: High School: 1yrs.:
College yrs.: Post Grad. yrs.

Relator's Exhibit 2

PREVIOUS SERVICE If none, check here 331

**Continuous Service Certificate No.

First Enlisted in Regular Navy X Naval Reserve

Date: 3-24-36 Place: Brooklyn, NY

Last Enlistment or Extension: Regular Navy X

Naval Reserve Date: 11-8-41 Term: 4 years

Was Last Discharged: 3-26-46
(Date)

From: S.P. 3rd ND NY, NY

With: Honorable Discharged as: CSM (PA) 332
(Rate)

Service in Regular Navy: 9 (Years) 0 (Months) 09 (Days)

Naval Reserve ..... Marine Corps .....
(Years) (Months) (Days) (Years) (Months) (Days)

Coast Guard ..... Army .....
(Years) (Months) (Days) (Years) (Months) (Days)

National Guard
(State) (Date of Enlistment) (Date of Discharge)

PHYSICAL CHARACTERISTICS 333

Height: 5 feet 5½ inches; Weight: 157½; Eyes: Br.
(Color)

Sex: M; Hair: Blk; Complexion: Ruddy Color: W

Marks: (1) Mole on chin. (2) Vacc. scar on Rt. Arm.

(3) Tatoo on left Arm, Crossed Flags—USN

Relator's Exhibit 2

334 I CERTIFY that I have carefully examined, agreeably to the Regulations of the Navy, the above-named recruit, and find that, in my opinion, he is free from all bodily defects and mental infirmity which would, in any way, disqualify him from performing the duties of his rating, and that he has stated to me that he has no disease concealed or likely to be inherited.

/s/ T. J. Minnella, Lt. (MC) USNR,
Examining Surgeon.

T. J. MINNELLA, LIEUT. (MC) USNR.

335 For and in consideration of the pay or wages due to the ratings which may from time to time be assigned me during the continuance of my service, I agree to and with Robert T. Kern of the United States Navy, as follows:
(Name of Commanding Officer)

FIRST: To enter the service of the Navy of the United States and to report to such station or vessel of the Navy as I may be ordered to join, and to the utmost of my power and ability discharge my several services or duties and be in everything conformable and obedient to the several re-
336 quirements and lawful commands of the officers who may be placed over me.

SECOND: I oblige and subject myself to serve
4 years from 27 March , 1946
during minority until ..... , 1.....

unless sooner discharged by proper authority, and on the conditions provided by the act of Congress of March 3, 1875, as follows:

Relator's Exhibit 2

SEC. 1422. That it shall be the duty of the commanding officer of any fleet, squadron, or vessel acting singly, when on service, to send to an Atlantic or to a Pacific port of the United States as their enlistment may have occurred on either the Atlantic or Pacific Coast of the United States, in some public or other vessel, all petty officers and persons of inferior ratings desiring to go there at the expiration of their terms of enlistment, or as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be essential to the public interests, in which case he may detain them, or any of them until the vessel to which they belong shall return to such Atlantic or Pacific port. All persons enlisted without the limits of the United States may be discharged, on the expiration of their enlistment, either in a foreign port or in a port of the United States, or they may be detained as above provided beyond the term of their enlistment; and that all persons sent home, or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the Navy until their return to an Atlantic or Pacific port and their regular discharge; and all persons so detained by such officer, or reentering to serve until the return to an Atlantic or Pacific port of the vessel to which they belong shall in no case be held in the service more than thirty days after their arrival in said port; and that all persons who shall be so detained beyond their terms of enlistment, or who shall after the termination of their enlistment, voluntarily reenter to serve until the return to an Atlantic or Pacific port of the vessel to which they belong and their regular discharge therefrom, shall receive for the time during which they are so detained or shall so serve beyond their original

337 338 339

340 terms of enlistment, an addition of one-fourth of their former pay: *Provided,* that the shipping articles shall hereafter contain the substance of this section.

In the event of war or National emergency declared by the President to exist during my term of service, I oblige and subject myself to serve until six months after the end of the war or National emergency if so required by the Secretary of the Navy unless I voluntarily reenlist or extend my enlistment. I understand that when so detained the addition of one-quarter pay as specified in Section 1422, Revised Statutes, is not applicable.

341 I also oblige myself, during such service, to comply with and be subject to such laws, regulations, and articles for the government of the Navy as are or shall be established by the Congress of the United States or other competent authority, and to submit to treatment for the prevention of smallpox, typhoid (typhoid prophylaxis), and to such other preventive measures as may be considered necessary by naval authorities.

THIRD: I am of the legal age to enlist; I have never deserted from the United States Navy, Army, Marine Corps, or Coast Guard; I have never been discharged from
342 the United States Service or other service on account of disability or through sentence of either civilian or military court; and I have never been discharged from any service, civil or military, except with good character and for the reasons given by me to the recruiting officer prior to enlistment. I am not a member of the Naval Reserve, Naval Militia, Marine Corps Reserve, National Guard, or Army Reserve.

Relator's Exhibit 2

FOURTH: I understand that upon enlistment in the Naval Reserve, or upon transfer or assignment thereto, I may be ordered to active duty in time of war or when in the opinion of the President a National emergency exists, and that I may be required to perform active duty throughout the war or until the National emergency ceases to exist. 343

FIFTH: I understand that if I become a candidate for the Naval Academy and fail to pass the entrance examination, I will be returned to general service.

SIXTH: I have had this contract fully explained to me, I understand it, and certify that no promise of any kind has been made to me concerning assignment to duty, or promotion during my enlistment. 344

OATH OF ALLEGIANCE: I, Harold Edward Hirshberg do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and articles for the government of the Navy. 345

And I do further swear (or affirm) that all statements made by me as now given in this record are correct.

/s/ HAROLD EDWARD HIRSHBERG
(Signature in Own Handwriting, Surname to Right)

Relator's Exhibit 2

346 — Subscribed and sworn to before me this 27th day of March, A.D. 1946 and contract perfected.

United States citizenship substantiated.

/s/ ROBERT T. KERN, Lieut. Comdr. USNR
Executive Officer
Commanding, U. S. Shore Patrol, 3nd

*CITIZENSHIP.—Native born, use initials U. S.; Naturalized, N. U. S.; Alien, intention declared, A. D. I.; Alien, A; Guam, Guam; Philippine Islands, P. I.; Samoa, Samoa; and Virgin Islands, V. I.

347 **For reenlistment with continuous service note Art. D-1002, Bureau of Naval Personnel Manual.

A TRUE COPY. ATTEST:

John C. Cheasty
JOHN C. CHEASTY
COMMANDER, U.S.N.

NAVPERS 603 (REV. 5-46)
SHIPPING ARTICLES
PART 1 FOR BUPERS ENLISTED MAN'S JACKET

348

SHIP OR STATION	PLACE	CHANGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	STANDARD	MECHANICAL APTITUDE	ABILITY TO LEARN OF MEN		CONDUCT	CAUSE AND OF DISC
Navy Rect.Sta	Brooklyn, N.Y.	E	24 Mar 1936	AS	Min							
Navy Rect.Sta	Brooklyn, N.Y.	T	24 Mar 1936	AS								GCT
Naval Tra.Sta	Newport, R.I.	-	31 Mar 1936	AS							40	
Naval Tra.Sta	Newport, R.I.	-	30 Jun 1936	AS							40	
Naval Tra.Sta	Newport, R.I.	GR	24 Jul 1936	S2							40	
Naval Tra.Sta	Newport, R.I.	T	11 Aug 1936	S2							40	
Receiving Sta	Navy Yard Phila., Pa.	T	27 Aug 1936	S2							40	
USS PORTER		-	30 Sep 1936	S2		30	30				40	
USS PORTER		-	31 Dec 1936	S2		30	30				40	
USS PORTER		T	11 Jan 1937	S2		30	30				40	
Naval Hosp.	Phila., Pa.	Rec	11 Jan 1937	S2								
Naval Hosp.	Phila., Pa.	-	31 Mar 1937	S2							15	
Naval Hosp.	Phila., Pa.	T	2 Apr 1937	S2								
USS PORTER		T	14 Apr 1937	S2								

CHANGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	STANDARD	MECHANICAL APTITUDE	ABILITY TO LEARN OF MEN		CONDUCT	CAUSE AND CHARACTER OF DISCHARGE	RECOMMENDED FOR REENLISTMENT	SIGNATURE OF COMMANDING OFFICER
E	24 Mar 1936	AS	Min							GCT 71		
T	24 Mar 1936	AS										
-	31 Mar 1936	AS							40			
-	30 Jun 1936	AS							40			
GR	24 Jul 1936	S2							40			
T	11 Aug 1936	S2							40			
T	27 Aug 1936	S2							40			
-	30 Sep 1936	S2		30	30				40			
-	31 Dec 1936	S2		30	30				40			
T	11 Jan 1937	S2		30	30				40			
Rec	11 Jan 1937	S2										
-	31 Mar 1937	S2							15			
T	2 Apr 1937	S2										
T	14 Apr 1937	S2										

Relator's Exhibit 3

(See Opposite)

CONTINUOUS SERVICE CERTIFICATE

C. S. C. No. 167369

NAME HAROLD EDWARD HIRSHBERG SERVICE NUMBER 223-29-64

SHIP OR STATION	PLACE	CHANGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	SEAMANSHIP	MECHANICAL ABILITY	ABILITY AS LEADER OF MEN		CONDUCT	CAUSE AND CHARACTER OF DISCHARGE	RECOMMENDED FOR REENLISTMENT	SIGNATURE OF COMMANDING OFFICER
Naval Hosp.	Phila., Pa.	T	23 Apr 1937	S2							20			
USS PORTER			30 Jun 1937	S2		37	35				40			
USS PORTER		T	28 Aug 1937	S2		37	35				40			
USS RIGEL			30 Sep 1937	S2		38	38				40			
USS RIGEL		T	12 Nov 1937	S2										
USS PORTER			6 Dec 1937	S2		Compl.	NTC	for	SM3	on	11/4/37 Mk 3.38 cert.issued			
USS PORTER			31 Dec 1937	S2		38	38				40			
USS PORTER			25 Feb 1938	S2		Compl.	NTC	for	S1.	Mk.	2.78 Cert.issued			
USS PORTER			31 Mar 1938	S2		38	38	34			40			
USS PORTER		CR	16 May 1938	S1										
USS PORTER			30 Jun 1938	S1		39	39	35			40			
USS PORTER		T	20 Jul 1938	S1		39	39	35			40			
Naval Hospital	Mare Is., Cal.	Rec	20 Jul 1938	S1										

NAVPERS 600
Revised May 1938

Relator's Exhibit 3

(See Opposite)

5 SHIP OR STATION	PLACE	CHANGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	SEAMANSHIP	MECHANICAL ABILITY	ABILITY AS LEADER OF MEN		CONDUCT	CAUSE AND CHARACTER OF DISCHARGE	RECOMMENDED FOR REENLISTMENT	SIGNATURE OF COMMANDING OFFICER
Naval Hosp.	Mare Is., Cal.	T	17 Aug 1938	S1	- - -	- -	- -	- -	- -	- -	40	- - - - - - - -	- - -	
USS PORTER	- - - - - - - -	T	27 Aug 1938	S1	- - -	- -	- -	- -	- -	- -	40	- - - - - - - -	- - -	
Naval Hosp.	Mare Is., Cal.	Rec	27 Aug 1938	S1	- - -	- -	- -	- -	- -	- -	- -	- - - - - - - -	- - -	
Naval Hosp.	Mare Is., Cal.	- -	30 Sep 1938	S1	- - -	- -	- -	- -	- -	- -	40	- - - - - - - -	- - -	
Naval Hosp.	Mare Is., Cal.	T	22 Oct 1938	S1	- - -	- -	- -	- -	- -	- -	40	- - - - - - - -	- - -	
USS PORTER	- - - - - - - -	- -	31 Dec 1938	S1	- - -	38	38	- -	38	- -	40	- - - - - - - -	- - -	
USS PORTER	- - - - - - - -	T	10 Feb 1939	S1	- - -	38	38	- -	38	- -	40	- - - - - - - -	- - -	
USS CUMMINGS	- - - - - - - -	CR	16 Feb 1939	SM3	- - -	- -	- -	- -	- -	- -	- -	- - - - - - - -	- - -	
USS CUMMINGS	- - - - - - - -	- -	31 Mar 1939	SM3	- - -	37	36	- -	35	- -	40	- - - - - - - -	- - -	
USS CUMMINGS	- - - - - - - -	T	11 Apr 1939	SM3	- - -	Via USS HENDERSON					- -	- - - - - - - -	- - -	
USS MINDANAO	- - - - - - - -	- -	11 Apr 1939	SM3	- - -	37	36	- -	35	- -	40	- - - - - - - -	- - -	
USS MINDANAO	- - - - - - - -	- -	30 Sep 1939	SM3	- - -	38	38	- -	38	- -	40	- - - - - - - -	- - -	
USS MINDANAO	Canton, China	EE	8 Nov 1939	SM3	2 yrs	378	- -	- -	- -	- -	376	- - - - - - - -	- - -	
USS MINDANAO	- - - - - - - -	- -	31 Dec 1939	SM3	- - -	38	38	- -	38	- -	40	- - - - - - - -	- - -	

Relator's Exhibit 3

(See Opposite) ☞

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CONTINUOUS SERVICE CERTIFICATE

C. S. C. No. 167369

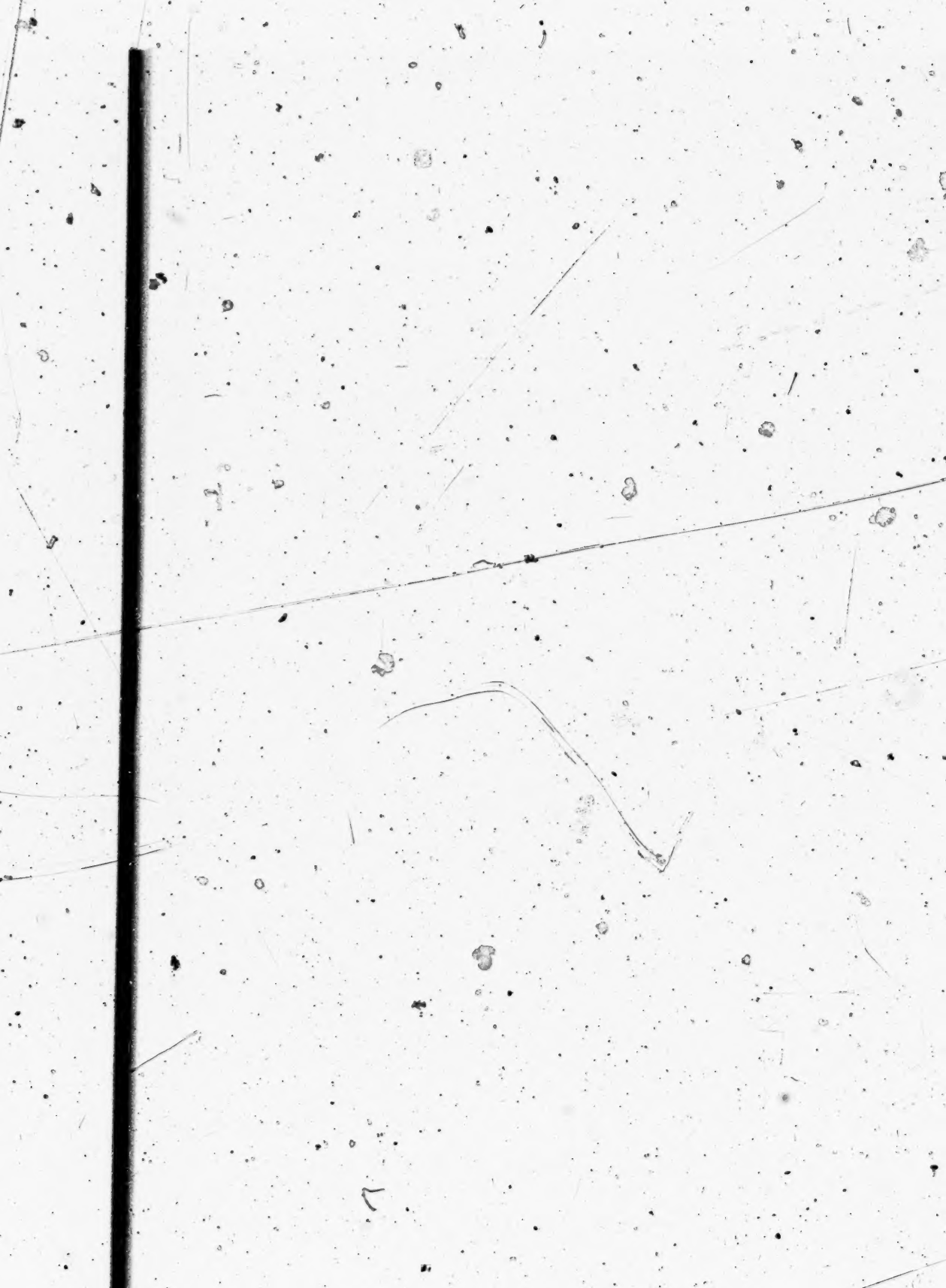
NAME HAROLD EDWARD HIRSHBERG SERVICE NUMBER 6,225-29-64

SHIP OR STATION	PLACE	CHANGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	SEAMANSHIP	MECHANICAL APTITUDE	ABILITY AS LEADER OF MEN		CONDUCT	CAUSE AND CHARACTER OF DISCHARGE	RECOMMENDED FOR REENLISTMENT	SIGNATURE OF COMMANDING OFFICER
USS MINDANAO		CR	16 Feb 1940	SM2										
USS MINDANAO			31 Mar 1940	SM2		35	35		35		30			
USS MINDANAO			30 Jun 1940	SM2		39	38		39		40			
USS MINDANAO			11 Aug 1940	SM2		Designated Navy Mail Clerk								
USS MINDANAO			30 Sep 1940	SM2		40	40		40		40			
USS MINDANAO			21 Oct 1940	SM2		Commended at Commanding Officer's mast this date for saving H. P. LECKLIDER, SC2, USN, from drowning in the Pearl River, Canton, China, on October 16, 1940. At the risk of his own life, in a two knot current in polluted water, HIRSHBERG jumped into the water and succeeded in dragging the resisting man to the gangway					
USS MINDANAO			21 Oct 1940	SM2										
USS MINDANAO			21 Oct 1940	SM2										
USS MINDANAO			21 Oct 1940	SM2										
USS MINDANAO			31 Dec 1940	SM2		40	40		40		40			
USS MINDANAO		CR	16 Feb 1941	SM1		40	40		40		40			
USS MINDANAO			31 Mar 1941	SM1		40	40		40		40			
USS MINDANAO		T	26 May 1941	SM1		Via USS TUTUILA, R/S Cavite, P.I & USS BLACK HAWK.								

NAVPERS 638 Revised May 1935

Relator's Exhibit 3

(See Opposite) ☞



7

SHIP OR STATION	PLACE	CHARGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	SEAMANSHIP	MECHANICAL ABILITY	ABILITY AS LEADER OF MEN		CONDUCT	CAUSE AND CHARACTER OF DISCHARGE	RECOMMENDED FOR REENLISTMENT	SIGNATURE OF COMMANDING OFFICER
PILLSBURY				SM1		Designation as Navy Mail Clerk revoked as of May 31, 1941								
PILLSBURY			30 Jun 1941	SM1							40			
PILLSBURY			30 Sep 1941	SM1		37	36		35		40			
PILLSBURY	Cavite, P.I.	Dis	7 Nov 1941	SM1		378	371	355	375		379	Expiration Enl, Honorable	Yes	
PILLSBURY	Cavite, P.I.	E	7 Nov 1941	SM1	4 yrs									
PILLSBURY		T	10 Nov 1941	SM1		37	36		35		40			
Navy Yard	Cavite, P.I.	Rec	10 Nov 1941	SM1										
Navy Yard	Cavite, P.I.		23 Dec 1941	SM1		Reported to U.S. Naval Units, Ft. Mills, Corregidor, P.I. for duty								
Naval Units Manila Bay Area	P.I. Ft.Mills, Cor P.I.	CR	23 Feb 1942	CSM										
Naval Units Manila Bay Area	Ft.Mills, Cor P.I.		1 Mar 1942	CSM		Missing due to enemy operations								
Japanese Prison Camp	Asiatic Area		6 May 1942	CSM		Known Prisoner of War								
Fukuoka Camp	Asiatic Area			CSM		P.O.W. to survivor								
Flt. Hosp. #103		Rec	19 Sep 1945	CSM		Reported for reprocessing & subsistence								
Flt. Hosp. #103		T	27 Sep 1945	CSM		Via USS LAWRENCE								

Relator's Exhibit 3

(See Opposite) ☞

C. S. C. No. 167369

CONTINUOUS SERVICE CERTIFICATE

NAME AROLL EDWARD HIRSHBERG SERVICE NUMBER 223-29-67

SHIP OR STATION	PLACE	CHANGE OF STATUS	DATE	RATING	TERM OF ENLISTMENT OR EXTENSION	PROFICIENCY IN RATING	SEAMANSHIP	MECHANICAL ABILITY	ABILITY AS LEADER OF MEN		CONDUCT	CAUSE AND CHARACTER OF DISCHARGE	RECOMMENDED FOR REENLISTMENT	SIGNATURE OF COMMANDING OFFICER
Naval Hosp.	San Diego,Cal.	- -	- - - - - - -	CSM	- - - -	Entitled to the Asiatic Pacific Area								
Naval Hosp.	San Diego,Cal.	Rec	12 Oct 1945	CSM	- - - -	Campaign Ribbon - -						- - - - - - - - -	- - - -	
Naval Hosp.	San Diego,Cal.	T	28 Oct 1945	CSM	- - - -	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -	- -	
Naval Hosp.	Brooklyn, N.Y.	Rec	30 Oct 1945	CSM	- - - -	As repatriated P.O.						- - - - - - -		
Naval Hosp.	Brooklyn, N.Y.	T	26 Feb 1946	CSM	- - - -	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -		
Permanent Shore Patrol 3ND	New York, N.Y.	Dis	26 Mar 1946	CSM	- - - -	39 38	- - - 36	- - - - -	39 37	- - - -	40 40	Expiration Enl Honorable Yes		
Permanent Shore Patrol 3ND	New York, N.Y.	E	27 Mar 1946	CSM	4 yrs.	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -		
Permanent Shore Patrol 3ND	- - - - - - - -	T	29 Aug 1946	CSM	- - - -	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -		
Receiving Sta.	Brooklyn, N.Y.	Rec	29 Aug 1946	CSM	- - - -	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -		NAVY DEPARTMENT Bureau of Naval Personnel
Receiving Sta.	Brooklyn, N.Y.	T	18 Nov 1946	CSM	- - - -	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -		
Navy Supply Corps School	Bayonne, N.J.	T	11 Feb 1947	CSM	- - - -	- - -	- - -	- - -	- - -	- - -	- - -	- - - - - - - - -		6 Mar 1947
Receiving Sta	Brooklyn, N.Y.	- -	21 Feb 1947	CSM	- - - -	Awarded the Army Distinguished Unit Badge with Oak Leaf Cluster to which								
Receiving Sta	Brooklyn, N.Y.	- -	21 Feb 1947	CSM	- - - -	HIRSHBERG is entitled by virtue of his services in defense of the Philippines								U.S.N. For Chief of Naval Personnel

NAVPERS 660 (1 May 1944)

Relator's Exhibit 5

382 WASHINGTON)
)
DISTRICT OF COLUMBIA)

Affidavit re Service in United States Navy of Harold Edward Hirshberg, Chief Signalman, U. S. Navy.

I, Thomas L. Sprague, Rear Admiral, U. S. Navy, being first duly sworn, do depose and state as follows:

383 (1) That I am Chief of Naval Personnel and in such capacity I am in charge of the Bureau of Naval Personnel, U. S. Navy Department, which Bureau is charged by law and Navy Regulations with the maintenance of records of service of all enlisted men in the United States Navy (5 U. S. C., Supp., 429, 434; 34 U. S. C. 591; U. S. Navy Regulations, Art. 443);

(2) That the service record of Harold Edward Hirshberg as an enlisted man in the United States Navy is contained in the files of the Bureau of Naval Personnel under my cognizance;

384 (3) That said service record shows that said Hirshberg reenlisted in the United States Navy as Signalman first class on November 8, 1941, and was discharged from said enlistment as a Chief Signalman on March 26, 1946; was again reenlisted as a Chief Signalman March 27, 1946, the day following the day of his discharge from his previous enlistment, and he is now serving and has served continuously in the United States Navy under said enlistment of March 27, 1946, since that date;

Relator's Exhibit 5

(4) That honorable discharges in the Navy are not issued by the Bureau of Naval Personnel but are issued by the commanding officer of the man concerned pursuant to administrative instructions contained in the Bureau of Naval Personnel Manual (Part D, Chapt. 9); 385

(5) That reenlistments of men in the Navy do not require prior reference to the Bureau of Naval Personnel before being effected but are entered into by the enlisted men concerned at the Naval activity to which he is attached pursuant to instructions contained in the Bureau of Naval Personnel Manual (Part D, Chapt. 1); 386

(6) That by reenlistment in the Navy on March 27, 1946, the day following his discharge from his prior enlistment, even though such enlistment was not entered into until late in the day of March 27, 1946, said Hirshberg suffered no break (a) in entitlement to pay and allowances due him for his naval service and he continued to be entitled to full pay and allowances as though he had not been discharged, 37 U. S. C., Supp. 109; Bu. S&A Manual, Vol. V, Sec. 54216; 5 U. S. C. 84; (b) in counting time for longevity pay increases as provided in the Act of June 16, 1942, as amended, 37 U. S. C., Supp., 109; (c) in counting time for transfer to the Fleet Reserve and retirement as provided in the Naval Reserve Act of 1938, as amended, 34 U. S. C. 854c; and in counting time for retirement as provided in the Act of March 3, 1899, as amended, 34 U. S. C. 431. 387

/s/ T. L. SPRAGUE
Rear Admiral, U. S. Navy,
Chief of Naval Personnel.

Relator's Exhibit 5

388 Subscribed and sworn to before me, a notary public in and for the District of Columbia, this twenty-ninth day of August, 1947.

/s/ LUCILLE HOLLAND
Notary Public, D. C.
My Commission Expires Nov. 6, 1951.

A TRUE COPY. ATTEST:

John C. Cheasty
JOHN C. CHEASTY
389 COMDR., U.S.N.

390

Relator's Exhibit 6

Tuesday 26, 1946 March. 391

0000 Roving patrol on deck 0000 to 0800
Broderick B.M. 2/c
O'leary C.M. 3/c
Rodrigues A.M.M. 3/c
Price Rd.M. 3/c

A.R.

0010 Roving patrol off deck

A.R.

0015 Petretta & Pelham off deck to return Jasper, Aaron S. 1/c. 910-50-08 to U.S.S. Franklin. 392

0040 Dubois on deck to relieve Pelham A.R.

0045 Roving patrol called in A.R.

0047 Pelham on deck

A.R.

0050 Petretta secured

A.R.

0055 Roving patrol off deck

A.R.

0102 Dubois off deck

A.R.

0410 Waves Barracks all secure

A.R. 393

0120 Chief Hershberg on deck to check conditions

A.R.

0125 Chief Hirshberg off deck

A.R.

0130 Pelham secured

A.R.

0154 Roving patrol called in

A.R.

Relator's Exhibit 6

394 0200 Dubois called to check conditions

A.R.

0205 Waves barracks, all secure

A.R.

0305 Waves barracks all secure

Thursday 28 March 1946

1615 "A" Roving Patrol off Deck.

GJS.

1630 "B" Roving Patrol off Deck to Ann ST Garage for Station Wagon

GJS.

1635 Chief Huit off Deck—Secured.

395

GJS.

1645 DuBois on Deck for Duty.

GJS.

1710 "B" Roving Patrol on Deck from Ann ST Garage with Station Wagon #29948 (9 gallons of gas) & Recon car #36390—(10 gallons gas)

GJS.

1712 "B" Patrol & DuBois off Deck To Receiving Station

GJS.

1715 "A" Patrol called to Check Conditions

GJS.

1725 "B" Patrol on Deck with DuBois

396

GJS.

1730 Lt. Perlis—on deck.

GJS.

1730 "B" Patrol off Deck.

GJS.

1737 Goodman, Ph.M. 3/c on deck for duty.

GJS.

Relator's Exhibit 6

1755 Chief Hirshberg on deck. 397

GJS.

1805 Chief Hirshberg off Deck to 68th St. with DuBois.

GJS.

1810 "B" Patrol called to check Conditions

GJS.

1830 Lt. Perlis off deck—Secured.

GJS.

1835 "A" Patrol called to check Conditions

GJS.

1850 DuBois on Deck.

GJS. 398

1905 "A" Patrol called to check Conditions

GJS.

399

Relator's Exhibit 7

400 NE3 A17-20/
DHq-15

HEADQUARTERS THIRD NAVAL DISTRICT
(10429) FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N. Y.

WFL:ate

12 February 1947

401 To: Judge Advocate, General Court-Martial, New York Naval Shipyard, Naval Base Station, Brooklyn, N. Y., convened by Commandant, Third Naval District, precept dated

Subj: Charges and specifications in the case of Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy.

1. The above named man will be tried before the general court-martial, of which you are judge advocate, upon the following charges and specifications. You will notify the president of the court accordingly, inform the accused of
402 the date set for the trial, and summon all witnesses both for the prosecution and the defense.

CHARGE I

MALTREATMENT OF A PERSON SUBJECT TO HIS ORDERS

SPECIFICATION 1

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval

forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp, pursuant to appointment by the Japanese authorities thereof, did, on or about 1 June 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one George N. Gaboury, carpenter's mate first class, U. S. Navy, a prisoner of war confined at said war camp who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking the said Gaboury with his closed fists, many times about the head and body; the United States then being in a state of war. 403 404

SPECIFICATION 2

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp pursuant to appointment by the Japanese authorities thereof, did, on or about 10 November 1942, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one Jim Edwards, private first class, U. S. Army, a prisoner of war confined at 405

406 said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking the said Edwards with his closed fists many times about the head and body; the United States then being in a state of war.

SPECIFICATION 3

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and
407 made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp pursuant to appointment by the Japanese authorities thereof, did, on or about 1 February 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one Robert H. Welch, coxswain, U. S. navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and
408 striking the said Welch with his closed fists; the United States then being in a state of war.

SPECIFICATION 4

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the

Relator's Exhibit 7

Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp, pursuant to appointment by the Japanese authorities thereof, did, on or about 1 February 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one George N. Gaboury, carpenter's mate first class, U. S. Navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking, catching hold of, and pushing the said Gaboury to the ground, and did therein and thereby, then and there, inflict on the said Gaboury's head and body multiple wounds and bruises; the United States then being in a state of war. 409 410

CHARGE II

Conduct to the Prejudice of Good Order and Discipline

SPECIFICATION 1

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Camp Murphy, Zablin Field, Luzon, Philippine Islands, well knowing that the Japanese authorities at said war camp had theretofore caused to be inflicted unreasonable, cruel, brutal, and inhumane punishment, to wit, starvation and severe beatings upon American prisoners of war confined therein who were 411

412 eported to the said Japanese authorities for alleged violations of Japanese regulations, and having good reason to believe that the said Japanese authorities would continue to cause such punishment to be inflicted upon American prisoners of war, did, on or about 1 March 1944, at the aforesaid war camp, wilfully, knowingly, and without justifiable cause, report to the Japanese authorities at said war camp that one George Garrett, private, U. S. Army, a prisoner of war confined at said war camp, intended and planned to escape from said war camp, thereby exposing the said Garrett to unreasonable, cruel, brutal, and inhumane
413 punishment at the hands of the Japanese, as he, the said Hirshberg, well knew; and the said Japanese authorities acting upon the said Hirshberg's report, caused to be inflicted unreasonable, cruel, brutal, and inhumane punishment upon the said Garrett, by starving him and striking him about the head and body with closed fists, clubs, straps, rifles, and by placing a garden hose in the mouth of the said Garrett, filling his stomach with water, and then standing on the said Garrett's stomach forcing him to expel said water, during a period of about three days, more or less, while he, the said Garrett, was confined to the guard house at said war camp, and the said Japanese authorities
414 did, therein and thereby, then and there, inflict mortal wounds upon the head and body of the said Garrett, as a result of which said mortal wounds so inflicted as aforesaid, he, the said Garrett, died during the said period, exact date to the relator unknown; the United States then being in a state of war.

Relator's Exhibit 7

SPECIFICATION 2

415

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Camp Murphy, Zablin Field, Luzon, Philippine Islands, well knowing that the Japanese authorities at said war camp had theretofore caused to be inflicted unreasonable, cruel, brutal, and inhumane punishment, to wit, starvation and severe beatings upon American prisoners of war confined therein who were reported to the said Japanese authorities for alleged violations of Japanese regulations, and having good reason to believe that the said Japanese authorities would continue to cause such punisment to be inflicted upon American prisoners of war, did, on or about 1 March 1944, at the aforesaid war camp, wilfully, knowingly, and without justifiable cause, report to the Japanese authorities at said war camp that one William R. Hill, private, U. S. Army, and one John L. Baker, private, U. S. Army, prisoners of war confined at said war camp, had conspired and planned to escape from said war camp, thereby exposing the said Hill and the said Baker to unresonable, cruel, brutal, and inhumane punishment at the hands of the Japanese, as he, the said Hirshberg, well knew; and the said Japanese authorities acting upon the said Hirshberg's report, caused to be inflicted unreasonable, cruel, brutal, and inhumane punishment upon the said Hill and the said Baker by starving the said Hill and the said Baker, and by striking the said Hill and the said Baker about the head and body with

416

417

418 closed fists, clubs, and straps, during a period of about three days, more or less, while they were confined to the guard house at said war camp, and the said Japanese authorities did therein and thereby, then and there, inflict multiple wounds and bruises upon the head and body of the said Hill and the said Baker; the United States then being in a state of war.

SPECIFICATION 3

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval
419 forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Island, did, on or about 1 March 1943, in the mess hall at said war camp, wilfully, maliciously, and without justifiable cause, strike one George Garrett, private, U. S. Army, a prisoner of war confined at said war camp; the United States then being in a state of war.

SPECIFICATION 4

420 In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Phillipine Islands, did, on or about 1 February 1943, at said war camp, wilfully, maliciously, and without justifiable

cause, strike one Johnson, an enlisted man in the U. S. Army, given name and rank to the relator unknown, a prisoner of war confined at said war camp; the United States then being in a state of war. 421

CHARGE III

ASSAULTING ANOTHER PERSON IN THE NAVY

SPECIFICATION

In that Harold Edward Hirshberg, 223-29-64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Phillipine Islands, did, on or about 20 February 1943, at said war camp, wilfully, maliciously, and without justifiable cause, assault one Thomas B. Hurtt, chief signalman, U. S. Navy, a prisoner of war confined at said war camp; the United States then being in a state of war. 422

MONROE KELLY
Rear Admiral, U. S. Navy,
Commandant, Third Naval District. 423

Relator's Exhibit 8

424 A17-20/Dbq-15/3BL:4b
HEADQUARTERS THIRD NAVAL DISTRICT
FEDERAL OFFICE BUILDING
90 CHURCH STREET
NEW YORK, N. Y.

27 November 1946.

To: Captain Walter G. Thomson, (D), U. S. Naval Reserve, New York Naval Shipyard, Naval Base Station, Brooklyn, New York

425 Subj: Precept for a General Court Martial.

1. Pursuant to the authority vested in me by the Secretary of the Navy (Navy Department's file A17-11(1)/A17-20, dated 4 March 1946), a GENERAL COURT MARTIAL is hereby ordered to convene at the New York Naval Shipyard, Naval Base Station, Brooklyn, New York, at 10 o'clock a. m., on Wednesday, 27 November 1946, or as soon thereafter as practicable, for the trial of such persons as may be legally brought before it.

2. The court is composed of the following members, any
426 five of whom are empowered to act, viz:

Captain Walter G. Thomson, (D), U. S. Naval Reserve;

Captain John F. Madden, U. S. Navy,

Captain Charles W. Hickernell, (D), U. S. Naval Reserve;

Captain Abraham C. Ten Eyck, U. S. Naval Reserve,

Captain Raymond H. Wilcox, U. S. Naval Reserve, 427

Captain Frank H. Foster, S(DM), U. S. Naval Reserve,

Captain John C. Hunter, (S), U. S. Naval Reserve,

Captain James I. Coddington, S(L), U. S. Naval Reserve,

Commander Arthur G. Norwood, (S), U. S. Naval Reserve,

Commander Leon J. Carro, (S), U. S. Naval Reserve,

and of Commander George B. Foley, S(L), U. S. Naval Reserve, and Commander Samuel Wolf, (S), U. S. Naval 428
Reserve, as judge advocates, either of whom is authorized to act as such.

3. The court is hereby authorized and directed to take up such cases, if any, as may be now pending before the general court-martial of which Captain John F. Madden, U. S. Navy, is president, appointed by my precept of 21 October 1946, and the general courts-martial of which Captain Richard E. Cassidy, U. S. Navy, was president, appointed by my precepts of 10 July 1946 and 7 March 1946, except such cases the trial of which may have been commenced.

429

4. No other officers can be detailed without injury to the service.

5. Detachment of an officer from his ship or station does not itself relieve him from duty as a member or judge advocate of a court. Specific orders for such relief are necessary.

6. This employment on short duty is required by the public interests. You will inform the above named members and

Relator's Exhibit S

430 judge advocates who were appointed by said precept of 21 October 1946, that they will continue on court martial duty under their previous orders. The court is authorized to adjourn over any holiday prescribed by article 330, U. S. Navy Regulations, 1920.

MONROE KELLY,
Rear Admiral, U. S. Navy,
Commander, Third Naval District.

A TRUE COPY. ATTEST:

431

432

Respondent's Exhibit "A"

NAVPERS-601 (Rev. 6-45)

HIRSHBERG, Harold Edward
(Last name) (First) (Middle)

223 29 64 CSM(PA) 04111 25 USN
(Service Number) (Rate) (Class)

Permanent Shore Patrol, 3ND
(Present ship or station)

26 March 1946

Discharged at New York, New York this date with HONORABLE DISCHARGE for reason of expiration of enlistment. Is recommended for reenlistment. Is recommended for Good Conduct Medal.

AUTH: BuPers Manual, Art. D-9104.
/s/ R. T. KERN, Lieut. Comdr., USNR.
Executive Officer, By direction.

MARKS UPON DISCHARGE:	3-26-46
Proficiency in Rate:	3.9
Leadership	3.9
Conduct.	4.0
FINAL AVERAGE IN MARKS UPON DISCHARGE	
Proficiency in Rate:	3.8
Seamanship:	3.6
Ability as leader of men	3.7
Conduct	4.0

RTK

A TRUE COPY ATTEST:

Fred H. Frey
FRED H. FREY
Lt. Comdr., USN

(Seal)

Respondent's Exhibit "B"

436 NAVPERS-601 (Rev. 6-45)

HIRSHBERG, Harold Edward
(Last name) (First) (Middle)

223 29 64 CSM(PA) 04111-25 USN
(Service Number) (Rate) (Class)

Permanent Shore Patrol, 3ND
(Present ship or station)

27 March 1946

437 Re-enlisted on board this date to serve for a period of four (4) full years. Retained on board.

/s/ R. T. KERN LIEUT COMDR USNR
Executive Officer, by direction

A TRUE COPY. ATTEST:

Fred H. Frey
FRED H. FREY
Lt. Comdr., USN

(Seal)

438

Respondent's Exhibit "F"

REPORT OF UNITED STATES SENATE DEBATE AND PROCEEDINGS OF MARCH 2, 1863 IN RESPECT TO PASSAGE OF S. NO. 467 ENTITLED "AN ACT TO PREVENT AND PUNISH FRAUDS UPON THE GOVERNMENT OF THE UNITED STATES", CONSIDERED BY THE SENATE SITTING AS A COMMITTEE OF THE WHOLE. Enacted as C. 67. 439

(Pages 952 to 958, CONGRESSIONAL GLOBE, 3rd Session of the 37th Congress, Part II, Appendix 1862-1863.)

REPORT OF U. S. SENATE PROCEEDINGS OF MARCH 2, 1863, IN RESPECT TO THE PASSAGE OF S. NO. 467. 440

FRAUDS IN MILITARY CLAIMS

On motion of Mr. HOWARD, the bill (S. No. 467), to prevent and punish frauds upon the Government of the United States, was considered as in Committee of the Whole.

THE VICE PRESIDENT. The bill will be read.

MR. HOWARD. The Committee on Military Affairs reported an amendment which is really a substitute for the whole bill. I do not, therefore, see the necessity of reading the original bill. 441

THE VICE PRESIDENT. If there be no objection the reading of the bill will be omitted. The Chair hears no objection, and the Secretary will merely read the amendment.

The Secretary read the amendment.

Respondent's Exhibit "F".

442 MR. HOWARD. I will simply say to the Senate that this bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and Treasury Department. The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil; and I suppose there can be no doubt that these complaints are, in the main, well founded. From the attention I have been able to give
443 the subject, I am satisfied that more stringent provisions are required for the purpose of punishing and preventing these frauds; and with a view to apply a more speedy and vigorous remedy in cases of this kind the present bill has been prepared.

The first section of the proposed substitute defines several new offenses and provides for their punishment by court-martial. The first offense, stated in brief terms, is making or presenting a fraudulent claim to the Government of the United States, or any of its Departments or officers.

MR. COLLAMER. At this point permit me to suggest to the Senate that those last words "or any of its Departments or
444 officers," had best be stricken out. I do not see the use of them and they involve an ambiguity.

MR. HOWARD. The Senator will have an opportunity to present his amendment. I merely want now to call the attention of the Senate to the main features of the bill. The second offense is making or using a false voucher for a similar purpose. The Third is making a false oath to any fact or statement in order to obtain the approval or pay

ment of any account by a proper officer. The fourth offense 445
is forging or counterfeiting signatures of any voucher for the purpose of obtaining payment or allowance of claim. The fifth offense is uttering or using such voucher as true. The sixth is conspiring to cheat the United States. The seventh is stealing and embezzling property belonging to the United States and used for military purposes. The eighth class embraces cases of contractors and other persons having United States property for military purposes; and using the same with intent to defraud the United States. The ninth is delivering a receipt for arms, munitions, etc., without a full knowledge of the fact certified in 446
the receipt, with intent to cheat and defraud the United States. The tenth offense is purchasing or taking in pledge from soldiers or officers, arms, clothing, etc., such soldiers and officers not having the right to sell or pledge them.

It will be observed that in the first section the offenses are confined to such persons as are in the military forces of the United States, or in the militia in the actual service of the United States. I have followed the language of the Constitution in this respect, and have confined the operations of this section to persons who are actually in the military service of the United States, or in the militia in actual 447
service in time of war. I have not undertaken, except in the instances of contractors and their agents, to define or set forth what is to be in the military forces of the United States, or in the militia in the actual employment of the United States in time of war. That question I hold to be a purely judicial question, which it is not competent for Congress to assume to solve. The Constitution, in the fifth amendment, declares that no person shall be punished for a capital or otherwise infamous crime without the present

448 ment or indictment of a grand jury, except in cases arising in the military or naval forces of the United States, or in the militia while engaged in actual service of the United States in time of war or public danger. Such is the prohibition upon Congress. We cannot, as I think, give a construction to the language of that amendment of the Constitution, because it is in its nature a judicial question, with which we have nothing to do. A man's liability to punishment by a court-martial must necessarily depend upon his status, that is, whether he is in the military forces of the United States, or whether he is not; and I do not con-
449 ceive that Congress has power to solve that question, or create by legislation any state of facts which shall bring the offender within the military power of the Government, holding, as I said before, that this power is subject of judicial construction.

The second section applies to that class of persons who are contractors, or who are employed to contract for ships, vessels, steamers, water-craft, ordnance, arms; munitions of war, etc., for the use of the Army and the Navy; and it declares that any person who shall contract to furnish these articles, and every person who shall, either as prin-
450 cipal or agent, make, authenticate, certify, pass, approve, or present for approval or payment to any officer any bill, receipt, voucher, entry etc., for the purpose of obtaining payment upon such contract, and any person who shall procure or aid in procuring from the Government of the United States, or any Department thereof, any money on such a claim, shall be deemed and considered to be in the military or naval forces of the United States or in the militia in the actual service of the United States, as the case may be.

The question will naturally arise whether a contractor

who enters into an agreement with the Government to furnish to the Government military or naval supplies, is brought by virtue of his employment within that clause of the Constitution which declares that in cases arising in the land or naval forces, the offender may be punished otherwise than by indictment. I call the attention of Senators to the language of that clause, for I forsee that objection will be raised: 451

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." 452

The question arises, what is a "case arising in the land or naval forces of the United States?" There is not any doubt that a soldier or officer who has enlisted in the service of the United States is or may be made subject to martial law. Why is he made subject to martial law? Because, being in the service of the United States, the act committed by him is a case arising in that service. The duties of a soldier or officer are easily understood. They are such acts as are military in their character and connected with the military service of the United States. Their employment is for the purpose of doing military duty; to aid the Government in making its military operations effectual. An officer or soldier enters the Army under contract, under an agreement to render this service; and how, I beg to inquire, does the case of a contractor who engages to furnish arms, equipment, or munitions of war to the United States for the same purpose, differ from the case of an 453

454 officer or soldier who is simply to bear arms and use the materia which the contractor is to furnish? Is not the employment of a contractor to furnish arms, etc., just as necessary to the successful prosecution of a war; in other words, to the successful use and employment of an army, as the employment of a soldier or an officer? For myself, I can see no distinction; for it is entirely clear that without the employment of contractors for the purpose of procuring them, the army itself would be totally worthless and useless. The supplies are as necessary to the Army, for giving efficiency to the Army, as the very guns, bayonets, and
455 cannon which the soldiers and officers are to use. It strikes me, therefore, that the case of a contractor employed for these purposes is as plainly within the category as the case of a soldier or officer; and that there is as much need of applying the stringency of the military jurisdiction in the case of contractors and their agents as in the case of soldiers or officers.

Mr. President, there are a few amendments which I propose to submit to the Senate before going further with the bill, in order to make its provisions harmonize and to correct its phraseology in some points. In line fifty-four, in
456 the first section of the substitute, I move to strike out the words "or shall have received any voucher," and to insert the word "a" before "certificate" in that line. As the clause now stands, it would seem to have an *ex post facto* operation, and that, as a matter of course, cannot be permitted in a criminal proceeding under the Constitution.

The amendment to the amendment was agreed to.

Respondent's Exhibit "F"

Mr. Howard. In order to give the clause precision, I move, in line fifty-eight, after the word "property," to insert "so used or to be used." 457

The amendment to the amendment was agreed to.

Mr. Howard. In lines five and six of section two, I move to strike out the words "in the same force or said service," which are entirely superfluous and tautological.

The amendment to the amendment was agreed to.

Mr. Howard. In line two, of section three, after the word "called," I move to insert "or hereafter to be called." 458

The amendment to the amendment was agreed to.

Mr. Howard. In the same section, after the word "contractor," in line five, I move to insert the words "or agent."

The amendment to the amendment was agreed to.

Mr. Howard. In lines one and two of section three, I move to strike out the words "nor or:" so as to read, "that any person heretofore called or hereafter to be called." 459

The amendment to the amendment was agreed to.

Mr. Howard. In section four, which declares the amount that any civilian shall forfeit for committing any of the acts mentioned in section one, I move to fill the blank in the seventh line with the word "two;" so as to read "$2,000."

The amendment to the amendment was agreed to.

Respondent's Exhibit "F."

460 Mr. Howard. I move to fill the first blank in section five by inserting the word "circuit;" and after the word "Columbia," in the third by inserting "or any court therein to be established, having general jurisdiction in civil cases," and to fill the second blank with the word "district;" so as to make the section read:

> That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases, the several district courts of the
461 Territories, etc.

The amendment to the amendment was agreed to.

Mr. Howard. In line six of section five, I move to strike out the word "whensoever" and insert "wheresoever." This is to correct a mere typographical error.

The Vice President. That amendment will be made if there is no objection. The Chair hears none.

Mr. Howard. In line six of section six, the word "Territory" should be "Territories."

462

The Vice President. That change will be made if there is no objection.

Mr. Howard. In line ten of section six, the blank should be filled with the word "two"; so as to read "$2,000."

The Vice President. The blank will be so filled if there is no objection. The Chair hears none.

Respondent's Exhibit "F"

The amendment, as thus amended is to strike out all of 463
the original bill after enacting clause, and to insert:

Any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any Department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person 464
in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining, the approval of payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry; any person in said forces or service who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement, or certificate, voucher, or entry, for the purpose of obtaining, or of aiding to obtain, any approval or payment of any claim against the United States or 465
any Department or officer thereof; and any person in said forces or service who, for the purpose of obtaining or enabling any other person to obtain from the Government of the United States, or any Department or officer thereof, any payment or allowance, or the approval or signature of any person in the military, naval, or civil service of the United States, of or to any false, fraudulent or fictitious claims, or forge or coun-

466 terfeit, or cause or procure to be forged or counterfeited, any signature upon any bill, receipt, voucher, account, claim, roll, statement, affidavit, or deposition; and any person in said forces or service who shall utter or use the same as true or genuine, knowing the same to have been forged or counterfeited; any person in said forces or service who shall enter into any claim, combination, or conspiracy to cheat or defraud the Government of the United States, or any Department or officer thereof, by obtaining, or aiding and assisting to obtain, the payment or allowance of any false or
467 fraudulent claim; any person in said forces or service who shall steal, embezzle, or knowingly and willfully misappropriate or apply to his own use or benefit, or who shall wrongfully and knowingly sell, convey, or dispose of any ordnance, arms, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or to be used for the military or naval service of the United States; any contractor or agent, paymaster, quartermaster, or other person whatsoever, in said forces or service having charge, possession, custody, or control of any money or other
468 public property, used or to be used in the military or naval service of the United States, who shall, with intent to defraud the United States, or wilfully to conceal such money or other property, deliver or cause to be delivered to any other person having authority to receive the same, any amount of such money or other property less than that for which he shall receive a certificate or receipt; any person in said forces or service who is or shall be authorized to make or deliver any certificate, voucher, or receipt, or other paper cer

tifying the receipt of arms, ammunition, provisions, 469
clothing or other property, so used or to be used, who shall make or deliver the same to any person without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States; any person in said forces or service who shall knowingly purchase or receive in pledge for any obligation or indebtedness, from any soldier, officer, or other person called into or employed in said forces or service, any arms, equipment, ammunition, clothing or military stores, or other public property, such soldier, officer, or other person not having the 470
lawful right to pledge or sell the same, shall be deemed guilty of criminal offense, and shall be subject to the rules and regulations made for the Government of the military and naval forces of the United States, and to the militia when called into and employed in the actual service of the United States in time of war, and to the provisions of this act. And every person so offending may be arrested and held for trial by a court-martial, and if found guilty shall be punished by fine and imprisonment, or such other punishment as to the court martial may adjudge, save the punishment of death. 471

SEC. 2. And be it further enacted, that any person who shall contract to furnish ships, vessels, steamers, boats or other watercraft, ordnance, arms, ammunition, munitions of war, clothing, subsistence, or military or naval supplies of any kind whatsoever; and every person who shall, either as principal or agent, authenticate or certify, pass, approve, or present for approval

472 or for payment to any officer of the United States, any bill, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, or power of attorney, for the purpose of obtaining payment upon such contract; and any person who shall procure or aid in procuring, payment from the Government of the United States, or any Department or officer thereof, of any money or claim whatsoever, for such ships, vessels, steamers, boats, or other watercraft, ordnance, arms, ammunition, munitions of war, clothing, subsistence, or military supplies of any kind, shall be deemed and con-
473 sidered as in the military or naval forces of the United States, or in the militia in the actual service of the United States, as the case may be, and shall be subject to the said rules and regulations. And if such person shall be found guilty by a court martial of having violated any of the foregoing provisions of this act, he shall be punished by fine and imprisonment, or such punishment as the court martial shall adjudge, save the punishment of death.

Sec. 3. And be it further enacted, That any person
474 heretofore called or hereafter to be called into or employed in such forces or service, who shall have committed any violations of this act and shall afterwards receive his discharge or be dismissed from the service, or cease to be a contractor or agent, as aforesaid, shall, notwithstanding such discharge, dismissal, or ceasing to be a contractor, continue to be liable to be arrested and held for trial and sentenced by a court martial, in the same manner and to the same extent as if he had not received such discharge or be dismissed or ceased to be a contractor.

Respondent's Exhibit "F"

Sec. 4. And be it further enacted, That any person not 475
in the military or naval forces of the United States nor
in the militia called into or actually employed in the
service of the United States, and not such contractor,
who shall do or commit any of the acts punished by any
of the foregoing provisions of this act, shall forfeit and
pay to the United States the sum of $2,000, and, in
addition, double the amount of damages which the
United States may have sustained by reason of the
doing or committing of such act, together with the cost
of suit; and such forfeiture and damage shall be sued
for in the same suit. 476

Sec. 5. And be it further enacted, That several district
courts of the United States, the circuit court of the
District of Columbia or any court therein to be estab-
lished having general jurisdiction in civil cases, the
several district courts of the Territories of the United
States within whose jurisdictional limits the person
doing or committing such act shall be found, shall,
wheresoever such act may have been done or committed,
have full power and jurisdiction to hear, try, and deter-
mine such suit. Such suit may be brought and carried
on by any person, as well for himself as for the United 477
States; the same be at the sole cost and charge of such
person, and shall be in the name of the United States,
but shall not be withdrawn or discontinued without the
consent, in writing, of the judge of the court and the
district attorney, first filed in the case, setting forth
their reasons for such consent.

Sec. 6. And be it further enacted, That it shall be the
duty of the several district attorneys of the United

Respondent's Exhibit "I"

478 States for the respective districts, for the District of Columbia, and for the several territories, to be diligent in inquiring into any violations of the provisions of this act by persons liable to such suit, and found within their respective districts or territories, and to cause him or her to be proceeded against in due form of law for the recovery of such forfeiture and damages; and such person may be arrested and held to bail in such sums as the district judge may order, not exceeding the said sum of $2,000; and twice the amount of the damages sworn to in the affidavit of the person
479 bringing the suit.

Sec. 7. And be it further enacted, That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the damages he shall recover and collect, and the other half thereof shall belong to, and be paid over to, the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant; to be allowed and taxed according to any provision of law or rule of court in force, or that shall
480 be in force in suits between private parties in said court; Provided, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Sec. 8. And be it further enacted, That every such suit shall be commenced within three years from the doing or committing the act, and not afterwards.

Respondent's Exhibit "F"

Sec. 9. And be it further enacted, That all acts and 481
parts of acts inconsistent with or repugnant to any of the provisions of this act are hereby repealed, saving however, and excepting any and all suits or prosecutions now commenced pending, and all rights of suit or prosecution under any prior act of Congress, on account of the doing or committing of any act hereby prohibited; and all rights and claims which the United States, or any person or persons, now have, growing out of such prior act; and which pending suits and prosecutions shall proceed and be determined, and all which rights and claims shall remain and be as valid 482
and effectual as if this present act had not been passed; nor shall this act be so construed as in any way to impair or affect the obligation, duty, or liability of any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable for any person who now is or shall hereafter become the surety of any person contracting with the United States, or any officer or agent thereof; but every such surety shall be liable and answerable for the default of his principal in the same manner as if 483
this act had not been passed, save to the extent to which his principal has performed the contract, or, if damages having been so recovered, to the extent of one half of the damages so recovered and paid; which last amount may be shown in reduction of damages in any suit brought against the principal and surety, or principals and sureties, on their contract.

Mr. Howard. I offer a new section to come in between sections eight and nine.

Respondent's Exhibit "F"

484 And be it further enacted, That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits of contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such officer, agent, or member, or person so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than $2,000, nor less than $500, and by imprisonment
485 for a term not exceeding two years.

The amendment to the amendment was agreed to.

The Vice President. The question is on the amendment of the committee, as amended.

Mr. Cowan. The second section of this measure, it strikes me, contains a monstrous proposition, which the Senate will surely never agree to. It proposed to put a large class of our citizens, a very large class I may say, under martial law, to subject them to the rules and articles of war, and it
486 proposes to do that upon the ground that because they are connected with the Army in furnishing it with supplies—that is the only connection, I believe, that is contemplated—they shall be deemed and considered to be in the military and naval forces of the United States. Now, Mr. President, to be in the military and naval forces of the United States is a fact; and to declare that a man not in the military and naval forces shall be deemed and considered to be there is simply an absurdity, only equaled by the absurdity of sub

jecting a man to the rules and articles of war who has never 487
subscribed to those articles, who has never taken an the oath (*sic.*), to obey them, and who is in no sense, manner, or form, a soldier.

I may say, sir, that I am as much in favor of punishing frauds committed against the Government as anybody in the world can be; but, at the same time, I am opposed to doing it in such manner as to absolutely overturn the whole frame and system of our jurisprudence. It is proposed by the second section, "that any person who shall contract to furnish ships, vessels, steamers, boats, or other water-craft; ordnance, arms, ammunition, munitions of war, clothing, 488
subsistence, or military or naval supplies of any kind whatsoever," "shall be deemed and considered as in the military or naval forces of the United States, or in the militia in the actual service of the United States, as the case may be," and subject to punishment by court-martial as such.

Surely it is not seriously proposed to subject all the tailors now making clothing for the soldiers, and all the shoemakers making their shoes, to martial law and to trial by court-martial. I can scarcely believe that Senators, and especially Senators distinguished as lawyers, would ever seriously make such a proposition. I had supposed, sir, 489
that legislation, and especially criminal legislation, must have for its object, not the conviction of the guilty, but the protection of the innocent. ~~It is no~~ the theory of our law that all the guilty shall be punished, but that all the innocent in all cases shall be protected. It is only the guilty who can be proved guilty who are to be punished.

Therefore, Mr. President, I protest against this second section and deny that this Government has any authority under the Constitution to subject any man to trial by court-

490 martial under the rules and articles of war, except he be actually in the service of the United States, and except he has especially agreed to abide by and submit to those rules and articles. Let me put a case. A shoemaker in Lynn is charged with having committed some fraud in the manufacture of shoes for the Army, and he is arrested and brought by a provost martial, if you please, into the District of Columbia, there to be tried by a court-martial for that offense. Can any man conceive of a greater violation of all our notions of justice and the proper administration of the criminal justice of the country? And what, sir, is the pre-
491 sumption of the law in his case? That he is guilty? No, sir, it is that he is innocent; and the shield of the law hangs over him as an innocent man until the country is shown, and shown how? By a court-martial? By a captain or a major or a colonel, if you please, not learned in the law, without presentment by a grand jury, without any trial by a petit jury?

Mr. President, the (*sic.*) this is, I was going to say, absurd, but perhaps the term may be deemed harsh. Certainly it is impossible. No people of our origin, no people with our traditions, no people with our history, would ever
492 submit for one moment to such an outrage. This man has a right to say, "I am not guilty of the fraud; or, if I am, I committed it in Lynn. You must first get a grand jury of the vicinage, or my neighbors, to say that there is even probably cause to believe that I am guilty, and then I have a right to be tried before a properly organized court, and by a jury of my neighbors as to the fact, just like another man." Why not? If you talk to him of your rules and articles of war, he may well ask "what are they?" "I never heard of them; I never agreed to submit to them; I never was bound by them, and you cannot bind me now."

Respondent's Exhibit "I"

Caligula was thought to be a great tyrant because he wrote his laws in small characters, and placed them upon high posts where the people could not read them, and then punished them for an infraction of them. Mr. President, this would be still more severe and tyrannical, and particularly when we reflect that it will operate to-day, perhaps, upon a million of loyal American citizens. What is the difference between a fraud committed there and a fraud committed anywhere else? What has it of the military character? Does the fact that a man commits a fraud in making a shoe for a soldier confer on him any military character? Does it put him in the land or naval service? And by such a fiction as this, can the military criminal law, which is peculiar and confined to camps, be extended over such an immense body of our citizens? Surely, I say, nobody can be serious in presenting such a proposition. Let any man think for an instant of himself in such a predicament, and then the rights which he has inherited and the laws of which he has heretofore been proud will come up and stand around him, and he will feel that they belong to him in that hour of trial and calamity. 493 494

There is another clause in the same second section that does seem to me may be calculated to operate very great hardship: 495

> And any person who shall procure, or aid in procuring, payment from the Government of the United States, or any Department or officer thereof, of any money or claim whatsoever, for such ships, vessels, steamers, boats, or other water craft, ordnance, arms, ammunition, munitions of war, clothing, subsistence, or military supplies of any kind, shall be deemed and con-

496 sidered as in the military or naval forces of the United States.

Why, Mr. President, that would sweep in the legal profession from one end of the country to the other; that would sweep in honorable Senators upon this floor. And you will remark, sir, that the falsehood of these claims in not alleged to be known to the person aiding in procuring their payment. There is no *scienter* here in this criminal act; a man is to be convicted by a court-martial without having known that he committed any offense whatever. A man may aid
497 in procuring the payment of a claim which is false, fraudulent from the beginning, and yet he may not be aware of it; and if he is not aware of it, he can commit no offense by assisting in procuring the payment of it at the Treasury. Claims are sent here every day, perhaps thousands of them, to members of both Houses, in order to procure their payment at the Departments. Will anybody pretend that we subject ourselves to martial law, that we can be tried by a court-martial, if it turns out that those claims are fraudulent or forged? I therefore move to strike out the second section entirely.

The learned Senator from Michigan, who has offered this
498 bill, seemed to be at a loss to know why there should be a difference between a soldier in the service of the country and the artisan or contractor, when they are both perhaps guilty of the same offense; why, if the soldier can be punished by the martial law, the other cannot also. I may be allowed to state, what will be obvious upon a moment's reflection, that a soldier, a man in the service of the country, actually in the land or naval service, is from the very necessity of the thing subjected to his summary and curt law,

and he is from the very necessity of the thing deprived of 499
those high privileges in which indeed his liberty consists,
guarantied to him by the fifth amendment of the constitu-
tion. If offenses be committed by those actually in the
service, it is utterly impossible that they can be turned over
to the civil authorities for punishment according to the
course of the municipal law; there must be some short and
summary mode of disposing of them then and there, and
to the great end of military discipline; and hence it is by
force of this necessity, and impelled by it, that the anomaly
exists. If the necessity did not exist, of course the exception
would never have been made; the soldier would have been 500
entitled in defense of his innocence to the same safeguard
and to the same careful consideration on the part of the law
that the civilian is in the country. There can be no possible
necessity that the citizen not in the service shall be sub-
jected to this martial law, when there are so many other
and better modes of reaching him, better not only to him,
but better for all of us. It is better for our race that he
should be tried according to the course of the common law
which prevails everywhere in this country.

While I am up, Mr. President, I may state another ob-
jection to this bill, and that is that it proposes to punish by 501
fine, by *qui tam* action, by the payment of money, one half
to the informer and the other half to the Government, that
which is in itself a crime, which has the essence of crime
in it, which should be punished by the criminal courts, and
punished by fine and imprisonment. If a Government
punish him just as though he had violated it against any
body else. Let the punishment, however, be graduated ac-
cording to the enormity of the offense. If by means of his
fraud he procures $1,000,000 from the Government, his

502 punishment should be so much the greater; if he procures but $100 let it be so much the less. I object, therefore, to the scheme proposed by the remaining sections of the bill. I would agree with great willingness to make all these offenses misdemeanors and punish them by fine and imprisonment, and I would insist that the fine should be as heavy as it can be without being excessive, so as not to violate the Constitution in that behalf, and that there should be added to it such an imprisonment as would make it effectual. Indeed, it is not now so much for the want of law that this mischief prevails everywhere, as it is from a seeming
503 utter unwillingness on the part of those in authority to vindicate the laws that already exist by subjecting to punishment those who are guilty.

I am not so certain but that there are now on the statute-book laws ample to provide for the complete punishment and prevention of these frauds, but nobody does it. We appoint a committee to investigate a certain subject; that committee makes a report which astounds everybody, or certainly would astound everybody in any other country but this; and the guilty men go abroad, and they perform customary and their usual avocations; they are received among their friends just as before; perhaps their character
504 is somewhat heightened by the adroitness they have manifested in their diabolical schemes for the purpose of procuring money from a distracted, and what will in a short time be an impoverished country. Why is this, Mr. President? Are there no courts; are there no district attorneys; is the form of indictment lost; or is it taken to be understood that a man can cheat the Government with impunity, although as to all other people he is amenable to the municipal laws for preventing frauds and cheats? I have no

doubt that if the officers of the Government would do their 505
duty when a man is caught procuring money by these pretenses, and false and forged claims in any of the thousand modes by which it may be done, he could be punished. He could be now if the proper officers were on his trail, and if the proper precautions were taken to enforce the laws we now have.

This may all be made simple. These frauds all fall within a great class. I suppose they are classified in almost every State in the Union. I believe now in addition to the remedies provided by the common law, there is a statute in almost every State in the Union which makes the procurement of 506
money or any valuable thing by means of a false misrepresentation of an existing fact, a criminal offense; and that is all of it. Whenever a man falsely misrepresents an existing fact and by means of the credence which he obtains in consequence of that false representation, procures money or any other valuable thing, that instant he becomes guilty of the offense and is within the range and purview, I think of the statute of every State in the Union, and I am not certain but also within the laws of the United States.

Upon the whole, sir, I think that where this bill should be lenient it is severe; and where it should be severe, where 507
it should impose upon a man criminal penalties, it divides the matter, it subjects him to a *qui tam* criminal prosecution for the purpose of multiplying informers, and to some extent, it is true, punishing him, but not punishing him as he should be punished, because out of his guilty gains it is more than likely that he could pay the amount that any jury would assess upon him. I hope that these sections will be made more stringent and severe, and that they will be made to operate upon all those not actually in the land

508 and naval service, while this monstrous proposition of putting everybody under martial law shall be thrown aside, as it ought to be.

MR. POMEROY. I would not do or say anything to defeat the object of such a bill as this, if the bill was carefully drawn and matured so as to secure that object. It does occur to me that in the second and third sections the bill proposes to deem and consider as in the military service of the United States a class of persons as numerous as the whole Army itself—all who are contractors and hangers on, directly
509 or indirectly.

MR. WILSON, of Massachusetts. I take it that a very few hundred names will include all the contractors. The idea that this provision reaches to a tailor or a shoemaker or anybody else who is at work for a man that has a contract is ridiculous and absurd it was never intended to cover them, and does not.

MR. POMEROY. The suggestion I was going to make was, whether if these persons are to be considered in the military and naval service of the United States, we do not commit
510 the Government to repairing damages they may sustain, to granting pensions to person who die and suffer. If we are to repair all the damages that may accrue to contractors and persons who are considered by this bill in the navy and military service of the United States

MR. C[illegible]. I beg to suggest to the Senator from Kansas that he makes a mistake in the word used in the Constitution, which may lead to error. It is not the "service" it is the "forces"—"the land or naval forces."

Mr. Pomeroy. I know very well that the language of the bill is "considered to be in the land and naval forces of the United States." 511

Mr. Clark. That is the language of the Constitution.

Mr. Pomeroy. It is the language of the bill, except in the third section, and there the word "service" is used.

Mr. Clark. The Senator does not quite understand me. I mean to call his attention to the fact that the language of the Constitution was, "the land or naval forces;" not the language of the bill. We are to be guided by the Constitution. 512

Mr. Pomeroy. I do not know that considering this large class of persons as in the military or naval forces of the United States, puts them into that force. They may be there in the eye of this bill for purposes of punishment, and not for purposes of reward; or for the purpose of repairing the damages they suffer, or committing the Government to make good the losses they may sustain.

The practice of the Government has been when a person in the service of the United States doing his duty faithfully and honestly is subjected to losses, to imprisonment, to damages, over which he had no control, to indemnify him. We have passed bills to make good such losses. Now, it occurs to me that if all who are contractors, directly or indirectly embraced in this bill, are to be considered in the service, are to be punished by court martial, and are to be under the rules and articles of war, it may be that we commit ourselves to indemnifying those who suffer innocently, as a great many of them do. I wish to guard against committing 513

514 ourselves to make good their losses. All who are guilty of crime should be punished, but I do not wish to open the door wider for persons to come in and have damages repaired, pensions allowed, and claims granted, by taking into the service of the United States large class who are not now in the service, who cannot regularly be considered there, and who are only put into the service by this act. These are objections to my mind.

Mr. Howard. Mr. President, the Senator from Pennsylvania takes the ground that it is incompetent for Congress
515 under the Constitution to include a contractor for army supplies within the penal provisions of this bill. He holds that a contractor cannot be regarded as being in the military or naval forces of the United States, in the sense of the Constitution. I differ from him in that regard. I think a contractor is fairly to be included in that category, and, as I said before, the necessity of such an inclusion is just as strong in the case of a contractor as in the case of a private soldier or an officer.

The Senator advances the idea, and repeats it, that in order to bring a person within the power of a court-martial in other words, to bring him within the scope of the con-
516 stitutional clause which speaks of "the military or naval forces of the United States," he must have consented to the rules and articles of war. The Senator complains that the bill assumes to punish persons who have not thus consented to be governed by the rules and articles of war. That is not the question; it is a mere side issue, which has nothing to to with the question of law before us. The Constitution nowhere required that either soldier or officer or other persons in the service of the United States shall consent to

the Articles of War? It says nothing about consent. The Constitution declares that Congress shall have power "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces" of the United States; it says nothing about the consent of the person to be governed. Indeed, the very language of the Constitution excludes the idea that any such consent on the part of the governed is necessary. It is as manifestly competent for Congress to raise an army without the consent of that army, as to do any other act which it is authorized to do under the Constitution. The practice heretofore has been to raise armies by enlistment or by volunteering; but it does not follow, because such has been our practice heretofore, that the Constitution requires it. The Constitution required no such thing as consent. If the exigencies of the country shall demand it, it is within the power of Congress, under the Constitution, not only to raise an army by a forced conscription, but to go even so far as to make a levy of the whole people *en masse* for the purpose of defending the country or prosecuting a war domestic or foreign. The consent of the person to be employed in the service has nothing to do with the constitutional power of Congress to force him into the service.

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It is evident, as I remarked before, that contractors for furnishing supplies to the Army and Navy are just as indispensable as soldiers and sailors in the prosecution of a war. Without supplies the Army and the Navy could not exist. The Government is a corporation, and must act by its agents. It has a right to declare positively that such and such person shall be required to furnish certain supplies for the support of the Army or Navy; or, if it pleases, it may enter into a contract with such persons by which they

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520 shall agree to do it. Now, sir, in cases of enlistment, what is it that brings the soldier or officer into the service of the United States? Under our former and present practice, simply a contract of enlistment. The obligation of the soldier to serve in the Army exists by contract, solely by contract; and the same is true, and true to the same extent, in the case of a contractor to furnish military supplies. The one thing is just as necessary as the other, and no more so.

As to the expediency of resorting to this more summary mode of punishment, I will call the attention of Senator to
521 some cases which have arisen during the present rebellion. Persons have been employed to furnish shells for the use of the Army; and in several cases it has turned out that these shells have been filled not with the proper explosive materials for use, but with saw dust; thus making the instrument of no utility whatever, and, by thus practicing a fraud upon the Government, endangering our military operations. A contractor who enters into an agreement to furnish arms for the use of the United States in prosecuting a war may practice the same description of fraud upon us; and I believe that some frauds of a very gross character
522 have already been practiced in the purchase and furnishing of small arms for the use of the Army. Arms have been supplies which, on examination and use, have turned out to be useless and valueless; and I ask Senators whether, on the question of expediency and justice, it is not as correct — as correct in morals — to subject that class of wretches who thus attempt to impose upon the Government to punishment by court martial, as it is to subject a soldier who has been guilty of a trivial or even an enormous breach of his duty? Where is the difference, I ask Senators, in point of

principle and in point of morals? There is, sir, none whatever. According to my reading, this system of employing contractors and treating them as civilians existed for a time in the French army during the wars of Napoleon; but experience taught him at length that it was necessary to subject the contractors to martial law to prevent their committing frauds, and to make them expeditious and prompt in the performance of their engagements. 523

Mr. President, it is desirable to enact some law which shall remove the stigma which rests upon the country and the Government in reference to the frauds, corruptions, and peculations which have disgraced our service during the whole of this war. It is one of the crying evils of the period, if report is in any degree to be credited, that our Treasury is plundered from day to day by bands of conspirators, who are knotted together in this city and other large cities for the purpose of defrauding and plundering the Government. As we all know, who are lawyers, and the most of us on this floor are such, that if we refer all these cases to the ordinary courts, and require a proceeding to be taken by a grand jury, and then a trial by a traverse jury, very little good can result. There are always persons haunting the room in which a grand jury sits with a view to influence their opinions or their findings; and I am informed by those who in the Department are particularly charged with the duty of ferreting out these frauds, that it is entirely hopeless to expect that any sufficient punitive or preventive system can be adopted which depends upon the action of a grand jury, and I believe it impossible. I believe that in matters of this kind a grand jury is little better than useless; that instead of being a protection to the Government, who is the real sufferer in all cases, they are but a protection to the knave 524 525

526 and the rogue. I desire to see some provision adopted which shall bring these gentry to speedy and exemplary justice; and I think this bill will do it.

The Senator from Pennsylvania objects, however, to a part of the second section, upon the ground that it contains no *scienter*. That part of it is as follows:

> Any person who shall procure, or aid in procuring, payment from the Government of the United States, or any Department or officer thereof, or any money or claim whatsoever for such ships, vessels, steamers,
527 boats, or other water-craft, ordnance, arms, ammunition, munitions of war, clothing, subsistence, or military supplies of any kind, shall be deemed and considered as in the military or naval forces of the United States.

There is, it is true, nothing said about "guilty knowledge" in this clause; but the whole section relates to contractors and the agents of contractors. The object of it is to bring that class of persons within the category of the first section, in which all these crimes are all defined; and if a contractor, or the agent of a contractor, has been guilty of any of the acts which are previously defined in the first section, he is
528 to be deemed within the military service of the United States, and punishable by court-martial. I confess, however, I do not see any very great importance in either the second or the third section; because if, upon adjudication, it shall turn out that a contractor is, in law, in the military service of the United States, he will be punished, although this clause should be stricken out. I have put it in, however, rather in deference to the opinion of some officers of the Government, who have deemed it extremely essential.

The other clauses which follow, and which prescribe the mode of proceeding to punish persons who are not in the military service of the United States, I take it, are open to no serious objection. The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the person committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fasioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

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Mr. Morrill. I sympathize with the motive of the honorable Senator from Michigan in his efforts to detect a class of persons who, I fear, are quite too numerous in the country, who are disposed to some pecuniary advantage out of this war. But I do not quite see the necessity for these provisions of the bill, and I think they are justly open to the criticism made by the honorable Senator from Pennsylvania. I think his objections are well taken, and the distinction is so important that I hope the honorable Senator from Michigan will consent that the bill shall be changed. It now undertakes to try persons who were never yet, I believe, in any country considered as in any way amenable to the rules and articles of war, as if they were

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532 actually in the service of the military or naval forces of the United States. According to the provisions of this bill, it will turn out that any ship-owner who shall charter his ship, and in that transaction be suspected of obtaining any advantage for himself as against the Government of the United States, will be actually subjected to the rules and articles of war, and dealt with as if he were in the service of the United States, either the naval or military service, be deprived of the right of trial by jury, be tried by a court martial, and sentenced accordingly.

Now, sir, I do not see any necessity for a measure of that
533 kind. Certainly the courts of all such cases are open, and if the law is not adequate, it may be so amended as to subject the person to such penalties and punishment as may be deemed necessary, leaving him to be prosecuted in the courts of the country. There is nothing in the situation or condition of a contractor that I can see that should subject him to the rules and articles of war. He is not within the lines of the Army. He is accessible at all times, and may be turned over to the courts, and may at any time be proceeded against in the courts of the country, and in that respect his case is entirely different from the case of a person who is in the military service. The distinction which authorizes the
534 articles of war to be applicable to persons in the military service seems to be a principle which necessarily excludes all other classes of persons. Certainly to try persons in civil life by the rules and articles of war, would be a very severe and a very rigorous administration of justice, either civil or criminal. I hope, therefore, that the honorable Senator from Michigan will consent to amend or strike out that section.

Respondent's Exhibit "E"

Mr. Howard. Allow me to ask the Senator from Maine one question. 535

Mr. Morrill. Certainly.

Mr. Howard. The Senator speaks of contractors being in civil life; I should like to know from the Senator what he understands by being in "the military or naval forces of the United States;" whether that clause of the Constitution may not and does not include those persons who are contractors, and under obligation to furnish the Army army supplies; whether that is not, irrespective of all existing statutes, as much being in the military service of the United States as to be a soldier carrying a gun? Where is the difference? Where is the distinction? That is the point that I want to get at. 536

Mr. Morrill. I do not know what in the contemplation of the Constitution it might have been, but as a matter of fact I do not suppose it was ever so regarded. Persons in the service actually enrolled and organized and subjected to military command, and very differently situated from persons who are not subject to that service and not subject to that military authority. 537

Mr. Howard. The Constitution requires no enrollment.

Mr. Wilson, of Massachusetts. Mr. President, these Halls have rung with denunciations of the frauds of contractors upon the Government of the United States. Investigating committees in both Houses of Congress have reported the grossest frauds upon the Government. The Government is doing what it can to stop these frauds and punish the per

538 sons who commit them. The Government finds, however, that it has no law adequate to punish them. Senators who object to this bill do well to show that we have laws which can reach such a case. The law officer of the War Department says there is now no law adequate to meet these cases of fraud upon the Government. This bill is reported for the purpose of ferreting out and punishing these enormous frauds upon our Government; and, for one, my sympathies are with the Government, and not with the men who are committing these frauds. We have all of us seen enough, since this rebellion broke out, of frauds perpetrated upon
539 the Government, and above all, and more than all, perpetrated upon our soldiers in the field; and I trust that the Senate will pass this bill, or some bill that will put fraudulent contractors in a position where they may be punished for their frauds. I move to amend the second section by striking out all after the word "that" in the first line to the word "and" in the twenty-first line, and inserting these words:

> All contracts to furnish ships, vessels, steamers, boats, or other water craft, ordinance, arms, ammunition, munitions of war, clothing, subsistence, or military
> 540 or naval supplies of any kind whatsoever, shall contain a provision that any person who shall hereafter contract to furnish any of said articles shall be deemed and considered as in the military or naval forces of the United States, or in the militia in the actual service of the United States, as the case may be, and subject to the rules and articles of war.

THE PRESIDING OFFICER, (Mr. FOSTER). The question is, "shall the second section be so as amended?" the motion to

perfect the section being in order before the question on striking out shall be taken. 541

Mr. Wilson, of Massachusetts. The object of my amendment is to confine the provision to contractors alone, and not to include all persons who have to do with bills and contracts. I propose that in the contracts there shall be this provision inserted, which they will understand, which they will sign, that they shall be deemed in the military service, and subject to the rules and articles of war. I think it is just, proper, and right; and I hope the provision will be adopted. 542

Mr. Davis. I do not think that there is any class of culprits who deserve more certain and speedy punishment than many of the classes of persons who are provided for, or attempted to be provided for, in this bill, and who have failed to perform their duties in the execution of contracts made with the Government. There is no law that would inflict punishment so severe as that it could probably be executed which I would not vote for; but I deem that the bill which the honorable Senator from Michigan has reported is incompetent entirely to bring them to justice; and in a few words I will express my reasons for this opinion. 543

If the honorable Senator will make his classes of offenses civil, and bring them under the jurisdiction of civil courts, I will vote for every feature of his bill: but to make them military offenses, and to subject the persons that will be embraced by the provisions he proposes to martial law and to trial before military courts, I think it is wholly incompetent for Congress to pass such a law. The honorable

Senator made one or two inquiries of the Senator from Maine which I will endeavor to answer, as well as I can. Article five of the amendents to the Constitution provides that—

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

This provision established two principles: 1. All criminals against the laws of the United States, except persons in the land or naval forces of the United States, or in the militia, when in actual service in time of war or public danger, are to be tried by the civil law and by civil courts, as contradistinguished from the military, for any capital or otherwise infamous crime. 2. All persons in the land or naval forces, or in the militia when in actual service in time of war or public danger, in every case of crime or offense, may be made subject to military law by military tribunals. To determine what particular persons can be tried by military law and military courts, it is only necessary to ascertain who are land and naval forces and militia; all others are amenable to another code and other forums. The Supreme Court has repeatedly, and upon plain principle of law, decided that terms and phrases incorporated in the Constitution must be taken according to the import and meaning which they bore at the time it was made. I do not know that the terms under consideration have now any different sense than what they then had.

But this proposition cannot be successfully controverted. It was the intention of those who made the Constitution,

and is its operation, to exclude from amenability to military law and courts, to the extent of capital and all other infamous punishments, every person who is not in the land or naval forces, or militia in the service of the United States, according to the meaning of those terms when the Constitution was adopted. Each and all of them mean troops, soldiers, men armed for war. Whenever the strength or force of an army is spoken of, not sutlers, teamsters, cooks, or waiters are meant and included, but only men who are armed in some mode, and who go into battle to fight or conduct it. Mere hangers-on, who are not soldiers or armed men, form no part of the land or naval forces, or militia in the service of the United States. This clause declares three general classes of soldiers, land and naval, those in the ordinary service, and militia in the United States service, and authorizes all of them to be excluded from trial by the civil law and courts in all cases arising in their service respectively.

These phrases, in a certain sense, are synonymous; they all mean and comprehend soldiers only; and militia describes the soldier of a State, not the followers of their camp, nor the men who do not bear arms. Whenever any State or States are called upon by the General Government for a quota of militia or conscripts, it has to furnish the full number of troops, soldiers, men to carry arms and to engage in battle; its teamsters, sutlers, and other camp followers are never computed. It seems to me clear that only troops, soldiers, armed men, can be "land or naval forces or militia in the service of the United States," and can be made subject to military law and trial.

This is a restriction as to persons; but there is another as to the offenses or character of the cases of which military

550 law and courts may be authorized to take cognizance. All such offenses must form "cases arising in the land or naval service, or in the militia, when in actual service in time of war or public danger." Such a case cannot occur with a person who is not to either of those services, but may between one who is and another who is not, when there would be two cases, one of the citizen and the other of the soldier. If the latter were to leave his camp and go to the residence of the former, and assault him, and in his proper self-defense he was to beat and injure the other, he would not be amenable to military law and courts, even if he slew
551 his assailant. He would be entitled to trial by jury. A soldier who strikes an officer, or kills another soldier, or commits any other offense which makes a case in the line of his service, may be made subject to a soldier's trial and punishment; but if he were to murder a citizen, he would be subject to indictment, trial, and punishment, even though he had been acquitted by a court-martial.

MR. HOWARD. Could he not be tried by a court-martial? That is the question.

MR. DAVIS. I do not think he could properly—not conclu-
552 sively, if that court were to discharge him. If the gentleman will examine the history of such trials in England, he will find that jurisdiction of military offenses; as a general rule, has been restricted to purely military offenses; and the violations of the civil laws by soldiers are cognizable by the civil courts.

I then came to the conclusion that forces, soldiers, troops, armed men, and not the followers of an army, are subject to military law and military courts; that it is only men of

war who are to be tried by the stern code, and by men whose rule is arbitrary power and implicit obedience rather than the just principles of law. But that men away from the camp and the army, and constituting no part of it, in reality or by connection or semblance, civilians, the myriads and variety and wide-spread contractors for army supplies, arms, munitions, clothes, boots, shoes, tents, corn, flour, bread, potatoes, peas, oats, hay, and an infinite of articles, could by an act of Congress be transformed into land or naval forces, or militia in the service of the United States, and their frauds, or unwitting delinquencies in the execution of their contracts, be made cases arising in the land, or naval, or militia service of the United States, is a stupendous absurdity.

If Congress were to pass a law declaring a cloud to be a whale, it would nevertheless be a cloud, and would be so treated by the world beside. This provision of the Constitution establishes a principle, and neither Congress nor the Secretary of War can eradicate that principle, or bring within its operation all nature and art too. They can neither diminish, enlarge, nor change it. The Senator informs us that this bill was framed by the Secretary of War.

Mr. Howard. The gentleman misunderstood me. I said at the War Office.

Mr. Davis. Well, sir, that is the same thing; the distinctive features of the bill fix its paternity on the Secretary of War. He is prone to bring every person and every act within military law and military courts. But if the honorable Senator will change his bill so as to make the offenses declared by it civil offenses, to be tried according to the court of the common law, I will support it with much satisfaction.

Respondent's Exhibit "F"

556 MR. HOWARD. If the Senator from Kentucky will pardon me, on looking at the statute as it passed at the last session, although I do not deem it a sufficient provision to meet the cases of law which are covered by section two, still I shall be content with that, and I will consent that the second section may be stricken out.

MR. DAVIS. I will give way after reading a single extract:

"Martial law, such as it is described by Lord Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law
557 is established and prevails in any country, it is of totally different nature from that which is inaccurately called 'martial law' merely because the decision is by a court-martial, but which bears no affinity to that which was attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons under all circumstances. Even their debts are subject to inquiry by a military authority; every species of of-
558 fense committed by any person who appertains to the army is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases not relating to the discipline of an army in those States which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered within the cognizance of military authority. In this country all the delinquencies of soldiers are not triable, as in most countries of Europe, by

martial law; but where they are ordinary offenses, against the civil peace, they are tried by the common law courts. Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain."

MR. HOWARD. Mr. President, the Senator from Kentucky and myself are so unfortunate as not to agree upon the proper interpretation of the language of the Constitution. I wish it were otherwise, and I have an equal respect for the opinion of my friend from Maine. I cannot concur, however, with the Senator from Kentucky. The Constitution declares, in article five of the amendments, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." It is quite clear, from the very language of this clause, that crimes which are neither capital nor infamous need not be punished by indictment or presentment of a grand jury; so that there is, by the plainest implication, a large class of offenses against the United States not coming within the category of capital or infamous offenses, which may be punished otherwise. This, I take it, will not be denied by the Senator from Kentucky. It is only those crimes the punishment of which is capital, or which are infamous crimes, that are required to be punished upon indictment or presentment. Now, sir, none of the crimes named in this bill are declared by the bill itself to be capital. I believe that the test whether a crime is an infamous crime in the sense of the Constitution is not the mode or measure

562 of punishment of that crime, but the quality and nature of the crime itself. Such, at least, is the more modern ruling, both of the English and of the American courts. But the clause goes on and contains an exception, not an exception of persons, as the Senator from Kentucky would seem to intimate, not an exception of individuals, but an exception of cases. The exception contains all "cases arising in the land or naval forces," whether in peace or war, and all cases arising in "the militia when in actual service in time of war or public danger." That is the express exception. Now, sir, it is plain enough that in all cases where the
563 punishment is not capital, or where the crime itself is not infamous in its character and quality, the trial may be had otherwise than by presentment or indictment; and it may be had before a court-martial if arising in the military or naval forces.

Well, sir, what is a case "arising in the land or naval forces of the United States, or in the militia, when in actual service in time of war or public danger?" The honorable Senator from Kentucky insists that the case must be one in which an officer or soldier of the United States has committed an offense, for he insists that this category includes that class of persons only. I disagree with him. In
564 giving a construction to any instrument, whether that instrument be a statute of a State or of the Federal Government, or a constitution, we must necessarily look to the consequences which will flow from any assumed interpretation; and if it shall appear that upon such an interpretation consequences injurious, unreasonable, or inconvenient are to flow, that interpretation is not to be adopted unless the language is so imperative in its terms as to require it. In short, it is the argument *ab inconvenienti*. Now, let us take

a plain case. Suppose an army to be in the field, and suppose 56
that within its lines and within its acknowledged military jurisdiction, a murder shall be committed by a citizen upon a soldier, the latter being in the discharge of his duty, being actually in the ranks in the service of his country: suppose this murder, in whatever form it may be committed, whether by poisoning or by open violence, is committed upon one of the soldiers within the lines, within the encampment; I ask my friend from Kentucky whether he would say that that was not a "case" in which the offender could, under an act of Congress, be punished by a court-martial?

56

MR. DAVIS. Most certainly I say so.

MR. HOWARD. That he could not be tried by court-martial?

MR. DAVIS. Yes.

MR. HOWARD. The Senator must say so, because he has already argued that the only persons subject to this law martial must be either officers or soldiers regularly enrolled in the service of the United States. Now, sir, I take it that the experience of the world is against my friend from Kentucky on that point. I take it that no military man, with a proper instruction in his profession, would hesitate for 567
one moment to subject a citizen who had committed the offense to trial and punishment by court-martial. It would be plainly a "case" arising in the military forces of the United States. It is well known that settlers in the tract, following the Army wherever it goes for the purpose of vending their commodities to the soldiers and officers under regulations, and are always held subject to martial law and trial by court-martial. They are citizens; they do

568 not compose a part of the enrolled troops of the United States. Take another case. Suppose that in time of war our Army has made an invasion of a foreign country, and that its very existence depends on the promptness and fidelity with which army contractors bring forward their supplies, whether of provisions, clothing, or arms; and suppose a contractor, having taken upon himself the responsibility of furnishing such supplies, indispensable to the success of the campaign, and even the existence of the Army, should take it into his head in the heart of such foreign country to destroy the supplies or fraudulently to make
569 way with them, even to sell them to the enemy, I ask my learned friend from Kentucky whether he would not regard that as a "case" plainly coming within the power of Congress to try by martial law and punish by martial law? Yet it could not be, according to his interpretation of the Constitution, for the reason that the contractor is not an enrolled officer or soldier in the Service of the United States.

MR. POWELL. Will the Senator from Michigan allow me? I think there is a law on the statute-book that will avoid a great deal of this discussion. If I understood the Senator from Massachusetts, he said that the law officer of the War
570 Department thought there was no law making contractors subject to the rules of the Army.

MR. WILSON, of Massachusetts. No sir.

MR. HOWARD. There is a law, but it is quite imperfect.

MR. WILSON, of Massachusetts. It is so imperfect that it cannot be executed.

MR. POWELL. There was a law passed at the last session on that subject. 57

MR. GRIMES. It does not apply to transports.

MR. HOWARD. It seems to me that the more reasonable and beneficial construction of this clause of the amendment is this: that where the offense has been committed, where the act has been done by a person so connected with the military service as that the act is plainly injurious to that service, it is a "case" arising in the military forces of the United States, and as such may be made cognizable by a court-martial; for without this construction I can well conceive of cases where irreparable injury might be done to the service unless the offender were brought to speedy justice, unless the remedy were suddenly, promptly, and effectually applied upon the spot. The exception in the clause was manifestly inserted for the benefit and protection of the service, and it ought to receive that construction; it ought to be interpreted with a view to the very end itself which was contemplated by the framers of the Constitution, which was to give efficiency to the Army and to the Navy. I cannot doubt, that the Congress of the United States has precisely the same power to conduct and carry on a war and to regulate all the incidents connected with or growing out of war, as any other Government on the globe. Its power is perfectly ample. Wherever there is a war there supervene to the United States all the incidents of war, and the Government may apply to that state of war all the laws that regulate war, no matter whether they be applied to individuals, or to communities, or to nations. We have the same power in this regard as France or any other Gov- 57 57 57

574 ernment on the face of the earth, and the Constitution in no respect limits us in its application and use. Without some such stringent and prompt proceedings as is contemplated by this bill we shall still have to complain of the enormous and flagrant frauds connected with the military service which are perpetually practiced upon the Treasury. I wish to punish the guilty speedily and without delay. I do not wish the people, who are looking on our proceedings here with so much interest, to sink down in despair under the idea that it is out of the power even of Congress to retrieve the character of the nation from the
575 stigma which this long practice of fraud and corruption has inflicted on our Government.

As to the amendment offered by the Senator from Massachusetts I do not know that I have any objection to it; indeed, I am willing to accept it; for it will, in my opinion, add not only to the perspicuity of the bill, but to its vigor and efficiency.

THE PRESIDING OFFICER, (Mr. Foster) The question is on amending the second section in the manner proposed by the Senator from Massachusetts, before the question is taken on striking out the second section, as moved by the Senator
576 from Pennsylvania.

MR. WILSON, of Massachusetts. I will withdraw that amendment. On studying over carefully the fifteenth section of the act of last year "to define the pay and emoluments of certain officers of the Army, and for other purposes." I find that contractors are subject to martial law.

MR. HARRIS. What page is that?

MR. WILSON, of Massachusetts. Page 321 of the volume of laws that I hold in my hand. These contractors are made subject to martial law by that act. I withdraw the amendment, and let the whole section be stricken out. 577

THE PRESIDING OFFICER. The amendment proposed by the Senator from Massachusetts is withdrawn.

MR. COWAN. It seems that the war officer has not made a very minute investigation, or perhaps he could have regulated this matter. I have only to suggest to the committee who have this bill in charge that I think it would be well, perhaps, if they gave it their attention. In the first place, in framing a law, it is necessary to ascertain exactly the mischief you desire to correct. I take it all these mischiefs result from conspiracy. I cannot conceive how the Government should be defrauded if the Government agent is an honest man. Where the Government agent purchases an article, or employs vessels or anything of that kind, if he is an honest man there is very little danger that the Government will suffer; but if he is a corrupt man, and the contractor be corrupt, and they conspire together, there is the offense, and it is from that offense the Government suffers. Now, I would suggest that a section be drawn making a conspiracy to cheat the United States by any false report as to the actual value of a commodity, by any false report as to the quality or the quantity of it, be made an offense, and I take it from the reports I have seen made by investigating committees, there is generally in the transaction itself enough to procure a conviction before a court and jury. If the Government agent is found giving two prices for an article, the price of which is well known, you 578 579

580 cannot explain it by any other hypothesis possible than that he and the seller had colluded together, and that they were to divide the difference between the actual value of the article and the one at which it was purchased. I think it would be well, therefore, to include in this bill a section making any conspiracy of that kind punishable by the laws of the United States.

MR. HOWARD. Here is one clause, I will inform the Senator from Pennsylvania:

581 Any person in said forces or service who shall enter into an agreement, combination, or conspiracy, to cheat or defraud the Government of the United States, etc.

It applies to persons in the military service.

MR. COWAN. The difficulty that I see about it is, that it speaks generally of a conspiracy to cheat and defraud, which would perhaps be had in an indictment. It ought to set forth the means by which the conspiracy is affected. For instance, an employe of the Government charters a vessel and pays $100 a day for it, when a jury might readily
582 be satisfied that a fair price for it was twenty dollars. In such a case they misrepresent the actual value of the vessel hired, I think, in order to make an indictment safe, that that should be set forth in the statute, and should be followed in the indictment; but a mere charge of conspiracy generally to defraud and cheat, without stating the mode, manner, and token by which it was done, would be bad, I think—bad for vagueness.

Respondent's Exhibit "F"

THE PRESIDING OFFICER. The question is on striking out 583
the second section of the amendment reported by the committee.

The motion was agreed to.

MR. HOWARD. That section being stricken out, it is necessary to amend the third section to make it conform to what precedes it. I move, therefore, in section three, line five, to strike out the words "or cease to be a contractor or agent as aforesaid."

THE PRESIDING OFFICER. Those words will be stricken out, 584
if no objection be made, in order to make the amendment conformable in its several parts.

MR. HOWARD. After the word "discharge," in the sixth line of the same section, I move to insert the word "or".

The amendment was agreed to.

MR. HOWARD. In the same line of the same section, I move to strike out the words "ceasing to be a contractor or agent."

585

The amendment was agreed to.

MR. HOWARD. In line ten I move to strike out the words "or ceased to be a contractor."

The amendment was agreed to.

THE PRESIDING OFFICER. The question now is on the amendment of the committee as amended.

586 Mr. Cowan. I should like to hear that third section read as amended.

The Secretary read it as follows:

> And be it further enacted, That any person heretofore called, or hereafter to be called, into or employed in such forces or service who shall have committed any violation of this act, and shall afterwards receive his discharge of be dismissed from the service, shall notwithstanding such discharge or dismissal, con-
> 587 tinue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Mr. Howard. I think another slight amendment should be made in the third line. The words "have committed" should be stricken out and the word "commit" inserted, so as to make the provision entirely prospective and not retroactive.

The Presiding Officer. That modification will be made, no objection being interposed.

588 Mr. Cowan. The Senator will allow me to suggest that he amend that section as proposed by the Senator from Massachusetts so as to provide that when these persons are taken into the service they be required to subscribe to the Articles of War the same as soldiers. That takes away from them all cause of complaint. They cannot afterwards allege that they have not had notice of peculiar rules and regulations to which they will be held subject by the Government. It can

be easily done, and then when a person is employed not perhaps immediately in the military service, because I do not understand it to apply exactly— 589

MR. HOWARD. This does not apply to contractors at all now.

MR. COWAN. But it applies to employes of the Government in the service.

MR. HOWARD. No sir; it applies to persons in the military service, and leaves to the courts the power to decide what persons are in the military service. It is a judicial question, as I remarked before. 590

MR. COWAN. If I held anyone to be subject to these rules and regulations, I would require him to subscribe to them upon his entering into the service of the Army. If the Government sends an employe into the Army for the purpose of performing certain services, let him subscribe to the rules and articles of war.

MR. HOWARD. The amendment of the Senator from Massachusetts applies to contractors totally.

MR. COWAN. That has not been offered. 591

MR. HOWARD. Yes, sir; he offered it, but withdrew it. I think the section had better stand as it is.

THE PRESIDING OFFICER. The question is in agreeing to the amendment of the committee as amended.

The amendment as amended was agreed to.

592 The bill was reported to the Senate as amended, and the amendment was concurred in.

MR. HARRIS. I desire to ask the Senator from Michigan whether the words "and not such contractors," in the fourth line of the fourth section, are still retained in that section?

MR. HOWARD. Those words, "and not such contractors" should be stricken out; and I make that motion.

THE PRESIDING OFFICER. Those words will be stricken out, if no objection be interposed.

593 MR. HOWE. Would it be in order to move an amendment to the eighth section of the amendment?

THE PRESIDING OFFICER. Amendments are in order.

MR. HOWE. I will inquire of the Senator from Michigan if he would have any objection to striking out "three," and inserting "six," in the eighth section; so that it will read:

> That every such suit shall commence within six years from the doing or committing the act, and not afterwards.

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MR. HOWARD. Not the slightest.

MR. GRIMES. You ought to make it a longer period.

MR. HOWE. I will move to amend that section by striking out "three" and inserting "six".

MR. GRIMES. I suggest to the Senator from Wisconsin to enlarge the term of the limitation to ten years. If a man

swindles the Government in times like these, there ought never to be any limitation; and no matter when the development may be made, no matter when it shall be discovered that he has been guilty of perpetrating fraud on the Government, the Government ought to have the privilege of coming upon him, or his estate and his heirs, and recovering the money of which he has defrauded it. I trust the Senator will accept of my proposition, to make it ten years in place of six. 595

Mr. Howe. I have no personal objection to the limitation proposed by the Senator from Iowa; but when I rose to propose the amendment I saw that there was a difference of opinion, some suggesting one term and some another; and I thought perhaps six years would meet with the views of the Senate, and perhaps ten would not. There is some weight, I think, to be given to this consideration, that the Government ought to be held to some little diligence in prosecuting these men. Besides, we cannot shut our eyes to the fact that in the lapse of ten years or a longer period testimony is likely to be lost; the memory is likely to be obscured as to the facts of a transaction; and an investigation prosecuted at that distance of time would be attended with trouble and hazard. I should not oppose a proposition to insert ten years but I think, perhaps, six years will be enough. 596 597

The Presiding Officer. The question is on amending the eighth section by striking out "three" and inserting "six".

The amendment was agreed to.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

Opinion of Galston, D. J.

598 UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Misc. 1193
September 26, 1947
73 F. Supp. 990

[SAME TITLE]

599 APPEARANCES:

FRANCIS A. MCGURK, ESQUIRE
Attorney for Relator

J. VINCENT KEOGH, United States Attorney
Attorney for Respondent

FRANK J. PARKER, ESQUIRE
Assistant United States Attorney
Of Counsel

600 The Relator was convicted by a Naval General Court Martial on August 12, 1947 for offenses alleged to have been committed by him in violation of Article 8 (2) of the Articles for the Government of the Navy of the United States, at various times from November 10, 1942 to March 1, 1944. During that period the Relator was a Japanese prisoner of war in the Philippine Island.

The Court Martial was convened by the Secretary of the Navy and sat at the Navy Yard in Brooklyn, between July 21, 1947 and August 12, 1947. On the latter date the Court Martial announced its decision, finding the Relator guilty of two of the nine charges of which he was accused. Those charges are set forth in the margin.* 601

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* CHARGE 1 MALTREATMENT OF A PERSON SUBJECT TO HIS ORDERS

Specification 1

In that Harold Edward Hirshberg, 223 29 64, Chief Signalman, U. S. Navy, while so serving with the U. S. Naval Forces, in the Far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp, pursuant to appointment by the Japanese authorities thereof, did, on or about 1 June 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one George N. Gaboury, carpenter's mate first class, U. S. Navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking the said Gaboury with his closed fists many times about the head and body; the United States then being in a state of war. 602

Specification 3

In that Harold Edward Hirshberg, 223 29 64, chief signalman, U. S. Navy, while so serving with the U. S. naval forces, in the Far East area, and having been captured and made a prisoner of war by the Japanese, and while so serving in the status of prisoner of war in the custody of the Japanese at a prisoner of war camp at Nielson Field, Luzon, Philippine Islands, and while serving as a petty officer in charge of a work section at said war camp pursuant to appointment by the Japanese authorities thereof, did, on or about 1 February 1943, while on duty as a petty officer in charge of a work section at said war camp, wilfully and without justifiable cause maltreat one Robert H. Welch, coxswain, U. S. Navy, a prisoner of war confined at said war camp, who was attached to said work section and subject to the orders of the said Hirshberg, by assaulting and striking the said Welch with his closed fists, the United States then being in a state of war. 603

604 On conviction, the Relator was surrendered to the custody of the Respondent to await sentence. In the petition for this writ of habeas corpus on a number of grounds the jurisdiction of the Court Martial is vigorously assailed.

The Relator is presently an enlisted man in the United States Navy, of the grade of chief signal officer. He was first enlisted in the Navy on March 24, 1936, and he continued in its service during re-enlistments, and was in the service of the United States Navy on ar about May 6, 1942 when he was captured in the Philippine Islands by the armed forces of the Japanese nation and made a pris-
605 oner of war. Exentually he was released from the domination of the Japanese, and on September 19, 1945 he reported to the United States naval authorities for reprocessing and subsistence. On midnight of March 26, 1946, his enlistment expired, at which time he received an honorable discharge, together with his mustering out pay. On the afternoon of March 27, 1946 he re-enlisted in the Navy. His arrest and trial for charges committed during the earlier enlistment followed, as has been stated, in July and August of 1947. The critical question presented is whether the charges and specifications survive the honorable discharge, and whether the Relator was
606 amenable to arrest therefor.

The facts are not in dispute. In the course of the administration of the Philippine Islands by the Japanese Army, the Relator was put in charge of a group of prisoners of war by a Japanese commander. The Relator contends that at no time did he ever issue or give orders, or perform any acts or duties as personnel of the Navy of the United States, and that, therefore, his acts were those of the Imperial Japanese Army, and could not be viola

tions of the Articles for the Government of the Navy. The 607
Relator argues that in assuming jurisdiction the Court Martial violated rights of the Relator by virtue of the Hague Conventions of 1899 and 1907, and the Geneva Convention of 1929. He seems to believe that he was either a prisoner of war or a member of the naval personnel, and that he could not be both at the same time. The fallacy is manifest, for one is not exclusive of the other. The Relator certainly did not cease to be a citizen of the United States on being captured by the Japanese, and as a citizen of the United States he was certainly not a civilian, but continued to be a member of the Navy. At no time did he 608
lose status as a member of the Navy personnel. In passing it may be said that this argument of the Relator is unsupported by any authority. That is not surprising, for it is impossible to conceive of any authority which would support it. The point is sought to be bolstered by the contention that the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1929, being subsequent to the enactment of Article 8 (2) of the Articles for the Government of the Navy (34 U. S. C. A., Sec. 1200 et seq.), in effect repealed the Articles for the Government of the Navy. That would be a strange result, for the Conventions referred to, though setting forth regulations for the 609
conduct of prisoners of war, in no way relieve the service personnel from the Articles for the Government of the Navy—or of Articles of War for the Army. The treaties describing right and obligations of prisoners of war are not in any way to be confounded with the articles for the government of the armed forces of the United States. The record of the Court Martial proceedings is not before me, but it is easily conceivable that if Hirshberg, in defense of

610 the crimes of which he stands convicted under Article 8 of the Articles for the Government of the Navy, had a legitimate defense arising out of his adherence as a prisoner of war to the obligations imposed by the Japanese government, he doubtless could have urged such defense. Whether he did or not could not have affected the jurisdiction of the Court Martial.

It is next urged that the Relator is not within the exception in the Fifth Amendment of the Constitution, which provides for indictment by grand jury of those accused of infamous and culpable crimes "except in the land or
611 naval forces." This argument must fail too because, as has been found, the Relator was in the naval forces of the United States at the time he committed the crimes of which he stands convicted.

Finally, however, we come to the critical issue raised by the Relator: that the offenses embraced in the conviction of the Relator did not survive the enlistment of the Relator in the Navy on March 27, 1946, nor his honorable discharge therefrom on March 26, 1946.

The hiatus between the termination of one enlistment and the beginning of the following is so far as time is
612 concerned very short indeed. Undoubtedly from midnight on March 26, 1946 to the afternoon of March 27, 1946, the Relator acquired civilian status; but it is the contention of the respondent that in effect the two contracts merged. Such conclusion is drawn by the respondent from the affidavit of Thomas L. Sprague, Rear Admiral. The deponent there says that Hirshberg suffered no break in "entitlement to pay and allowances due him for his naval service, and he continued to be entitled to full pay and allowances as though he had not been discharged, 37

U. S. C. Supp. 109*** (b) in counting time for longevity 613
pay increases as provided in the Act of June 16, 1942, as amended 37 U. S. C. Supp. 109; (c) in counting time for transfer to the Fleet Reserve and retirement as provided in the Naval Reserve Act of 1938 as amended, 34 U. S. C. 854 (c); and in counting time for retirement as provided in the Act of March, 3, 1899 as amended, 34 U. S. C. 431."

It is to be noted that all of the grounds thus stated relate to pay and allowances. However, in respect to the obligations of enlistment, we are met with the well established principle, indeed urged by the Respondent, that an enlistment in the naval service of the United States 614
constitutes a contract, In re Grimley, 137 U. S. 147. At the argument also it was conceded that if the Relator had not re-enlisted, the Navy would have been powerless legally to institute the Court Martial proceedings, for the offenses charged did not survive the honorable discharge, even despite Article 61 of the Articles for the Government of the Navy. As to survival after discharge, there is a marked difference betwen Article 8 and Article 14 (U. S. C., Title 34, Sec. 1200). The offenses covered in the latter article embrace such offenses as the presentation of false claims, agreement to obtain payment of false
615
claims, obtaining or aiding to obtain the payment of any claim against the United States based on any false or fraudulent statement, perjury, forgery, delivering less property than receipt calls for, giving a receipt without knowing the truth thereof, stealing property of the United States furnished or intended for the military or naval service thereof; unlawful purchase of military property; any other fraud against the United States. Provision is made in such Article 14 that "if any person being guilty of

616 the offenses described in this article while in the naval service receives his discharge*** he shall continue to be liable to be arrested and held for trial and sentence by a Court Martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." Article 8 covers offenses which, as compared to thoses enumerated in Article 14, are of a minor nature, i.e. scandalous conduct, cruelty, or oppression of any person subject to the orders of a member of the service, quarreling, fomenting quarrels, duels, contempt of a superior officer, etc. After the enumeration in Article 8 of some
617 twenty-two different kinds of offenses, there is no saving clause which parallels that of Article 14 for the trial of the offender after discharge. Nor is there any other provision in the Articles for the Government of the Navy which would confer jurisdiction on a Court Martial to review such offenses at any time after discharge, whether the offender acquired civilian status or had again enlisted in the Navy. Nor, of course, does the statute of limitations, Article 61, create jurisdiction; its function is merely to preserve a jurisdiction if it exists. To find jurisdiction then, it must stem from some other source. This is the
618 weakness of the respondent's position. If, as he asserts, an enlistment is a contract, so was the enlistment of the Relator on March 27, 1946. The enlistment, which is an exhibit before the court, recites that the Relator was last discharged on March 26, 1946. Then follow the terms of the contract, which in effect provides that "for and in consideration of the pay or wages due to the ratings which may from time to time be assigned me during the continuance of my service, I agree to and with Robert T. Kern

(Commanding Officer) of the United States Navy, as follows: 619

> 'First: to *enter** the service of the Navy * * * to report to such station * * * as I may be ordered to join, and to the utmost of my power and ability discharge my several services or duties and be in everything conformable and obedient * * * to the lawful commands of the officers who may be placed above me.
>
> 'Second: I oblige and subject myself to serve four years from March 27, 1946 * * * on the conditions provided by the Act of Congress of March 3, 1875 * * * 620
> I also oblige myself during such service to comply with and be subject to such laws, regulations and Articles for the Government of the Navy as are or shall be established by the Congress of the United States or other competent authority, and to submit etc.* "

It is unnecessary to quote or refer to any other provisions of the enlistment contract. Neither explicitly nor by implication can it be read as an extension of the contract which expired the day before.

Moreover, the argument of the Respondent that the 621
Relator merely by rendering himself subject to the jurisdiction of the Navy by re-enlistment opened the door to arrest and trial on charges relating to acts committed during the first enlistment, is supported by no judicial authority except Ex Parte Joly, 290 Fed. 858, which will be discussed later in this opinion. Indeed the Respondent admits that an honorable discharge is a formal and final

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* Italics mine.

622 judgment passed by the Government on a man's entire military record, United States v. Kelly, 15 Wall. 34; United States v. Landers, 92 U. S. 77. Naval Courts Martial are courts of special and limited jurisdiction as conferred by Act of Congress, Rosborough v. Rossell, 150 Fed. (2d) 809. In the proceeding here under consideration it must be observed that the jurisdiction assumed by the Court-Martial which tried the Relator is not supported by decisions recited in Court Martial Orders of the Navy, except C. M. O. 7, 1938, which will be discussed later; and through courts are not concluded by the opinions expressed in such pro-
623 ceedings, nevertheless great weight must be attached thereto in conformity with recent holdings of the Supreme Court as to administrative findings of fact and conclusions of law when made by experts in the field. I refer to the following Court Martial Orders:

C. M. O. No. 22, page 7, of 1917.
C. M. O. No. 1, page 15, of 1921.

C. M. O. No. 12, page 7 of 1929, which states that except in cases of violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law
624 giving jurisdiction to a Court Martial to try an enlisted man for an offense committed in a prior enlistment from which he had an honorable discharge, regardless of the fact that he has subsequently re-enlisted in the naval service and was serving under such re-enlistment at the time the jurisdiction of the court was asserted.

To the same effect see C. M. O. No. 12, page 11, of 1921; and C. M. O. No. 6, page 11, of 1926.

Among others, and one bearing closely on the facts of the pending case, is C. M. O. No. 1, page 9, of 1926. There it appeared that one J. Bahen was convicted by General Court Martial for an offense not cognizable under Article 14. On March 31, 1925 his term of enlistment expired and he was honorably discharged. The offenses concerning which he was convicted were committed during that enlistment. On April 1, 1925 he re-enlisted for four additional years. He was brought to trial on May 22, 1925 and convicted. The conviction was set aside because the Court Martial lacked jurisdiction. It is impossible to reconcile that holding of the reviewing authority with the assumption of jurisdiction by the Court Martial in the Relator's case. 625 626

However, apparently there is some lack of harmony prevailing in the opinions expressed in Court Martial Orders. In a late opinion obtained in C. M. O. No. 7, page 42, of 1938, this was said:

> "An enlisted man was discharged by reason of expiration of enlistment on December 28, 1937; reenlisted on December 29, 1937; tried on May 5, 1938 for an offense committed November 25, 1937. Held that as the accused was subject to naval law at the time of his offense and also at the time of his trial, the fact that he was in the meantime out of the naval service, is not sufficient reason for denying jurisdiction over his person and the offense with which he was charged (citing sec. 334, NC&B; CMO 22-1917, pp. 7-8; 237-1919, p. 22; 31 Op. Atty. Gen. 521-529). (File: MM-Ogletree, Jennings F. A17-20 (380505), Sept. 6 and 21, 1928. In this connection see also Ex Parte Joly, 627

628 290 Fed. 858 and G. C. M. Records Nos. 75740, 76425, 77457 and 78075.)"

It is to be noted that the only judicial authority relied upon to support that Court Martial Order was the reference to Ex Parte Joly, 290 Fed. 858. In that case the relator was an emergency Lieut. Colonel who was charged with various offenses between February 1920 and July 1920. On September 23, 1920 he was honorably discharged. On September 24, 1920 he was duly commissioned as a Major in the regular United States Army. The violations related
629 to Articles 94 and 95 of the Articles of War, Article 95 reading: "conduct unbecoming an officer and gentleman.—Any officer or cadet who is convicted of conduct unbecoming an officer and gentleman shall be dismissed from the service." On the subject of the jurisdiction of the Court Martial, which was challenged by the relator, the District Court wrote:

> "Surely, for its own protection, there must be power to dismiss from the military service an officer or cadet whenever 'conduct unbecoming an officer or gentleman' is discovered, no matter when it happened."

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That general language of the court's opinion is unsupported by any reference therein to judicial authority or otherwise, or to statute, and cannot be accepted in the light of the construction which must be given to Article 8 as contrasted with Article 14 of the Articles for the Government of the Navy. The Government's brief would seek to expand an interpretation of the power under Article 8 by reference to a transcript of the Senate pro-

ceedings of March 2, 1863, relating to S. No. 467, entitled "An Act to Prevent and Punish Frauds upon the United States." It is not at all conclusive that the intent of Congress was to amplify Article 8. Moreover we have often been cautioned as to the hazards involved in endeavoring to determine "intent" as distinguished from the stated object of a statute.* The statute must be narrowly construed, particularly since it is in effect a criminal code. That was said in Rosborough v. Rossell, supra, 150 Fed. (2d) 809. 631

For the foregoing reasons I cannot accept the opinion in C. M. O. No. 7, page 42, of 1938, as based on sound authority. 632

Colonel Winthrop, an acknowledged authority, in Military Law and Proceedings, page 93 (2nd Edition, 1920) wrote:

> "Jurisdiction after a second appointment or re-enlistment, * * * a subsequent re-appointment or re-enlistment into the Army would not revive the jurisdiction for past offense, but the same would properly be considered as finally lapsed."

Winthrop had considered it is true, only the questions of an officer or soldier in the Army who had been duly dismissed, resigned or discharged, but on principle there is nothing suggested for discriminating between the Army and the Navy in this respect. 633

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* See address by Mr. Justice Frankfurter delivered before the Association of the Bar of the City of New York, 1947, on "Statutory Interpretations."

634 For the foregoing reasons, I am compelled, though reluctantly in the light of the particularly reprehensible conduct of the Relator as found by the Court Martial to sustain the writ, since the Court Martial was without jurisdiction. As Judge Magruder said in Rosborough v. Rossell, supra, "we must apply the statute as it now stands."

Settle order on two days' notice.

U. S. D. J.

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Stipulation as to Contents of Record

UNITED STATES DISTRICT COURT

637

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

It is hereby stipulated and agreed by and between the attorneys for the respective parties to this appeal, that pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, the following shall constitute the record, proceedings and evidence to be included in the record on appeal herein:

638

Statement under Rule 15 of the Rules of the Circuit Court of Appeals for the Second Circuit.

Notice of Appeal dated December 23, 1947 duly filed on that date in the office of the Clerk of the United States District Court for the Eastern District of New York.

Writ of Habeas Corpus issued out of the United States District Court for the Eastern District of New York on August 18, 1947.

639

Petition for Writ of Habeas Corpus duly verified August 18, 1947 and filed the same day in the United States District Court for the Eastern District of New York.

The Return to the Writ of Habeas Corpus duly verified August 29, 1947 and filed in the office of the United States District Court for the Eastern District of New York on or about September 3, 1947.

The Traverse to the Return duly verified September 4,

640 The Order of the United States District Court made and entered on September 29, 1947 sustaining the Writ and discharging the relator.

Testimony taken before the Court on September 17, 1947 consisting of 87 pages of stenographer's minutes.

The following exhibits of the Relator:

Order of Monroe Kelly, Rear Admiral, United States Navy, Commandant, Third Naval District, dated August 29, 1947, confirming the findings of the General
641 Court Martial convicting relator, consisting of 6 pages (Exhibit1).

Certified copy of Contract of Enlistment of relator in the United States Navy, dated March 27, 1946, for a term of four years (Exhibit 2).

Photostat copy of Continuous Service Record of relator from March 24, 1936 down to February 21, 1947, consisting of 6 pages (Exhibit 3).

642 Certified copy of Affidavit of Rear Admiral T. L. Sprague, Chief of Naval Personnel, sworn to August 29, 1947 (Exhibit 5).

Photostat copies of Shore Patrol Log, United States Navy, 54th Street, Manhattan, New York City, consisting of 2 pages, dated Tuesday, March 26, 1946 and Thursday, March 28, 1946 (Exhibit 6).

Copy of Charges, Specifications, and Order of Trial lodged against relator bearing date of February 12, 1947 (Exhibit 7).

Precept dated November 27, 1946 specifying the members of the General Court Martial before which relator was tried and convicted, signed by Rear Admiral Monroe Kelly, Commandant Third Naval District (Exhibit 8). 643

The following exhibits of Respondent:

Certified copy of page 9 of Service Record of relator dated March 26, 1946 (Exhibit A).

Certified copy of page 9 of the Service Record of relator dated March 27, 1946 (Exhibit B). 644

Transcript of Report of United States Senate Debate and Proceedings of March 2, 1863, in respect to passage of S.467 entitled "An Act to Prevent and Punish Frauds upon the Government of the United States", consisting of 31 pages (Exhibit F).

The foregoing stipulation of the record.

Opinion of Honorable Clarence G. Galston, dated September 26, 1947, sustaining the Writ and discharging relator. 645

Certificate of Clerk.

646 Dated: Brooklyn, New York
January 20, 1948.

FRANCIS A. McGURK and JOHN J. O'NEIL,
Attorneys for Relator-Appellee
c/o Richard S. Holmes, Esq.,
Room 1817, 42 Broadway,
New York, New York.

J. VINCENT KEOGH,
United States Attorney

647 By:

FRANK J. PARKER,
Chief Assistant United States Attorney,
Attorney for Respondent-Appellant.
Office & P. O. Address,
521 Federal Building,
Brooklyn, New York.

648

Stipulation as to Record

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

Dated: January , 1948.

Attorneys for Relator-Appellee,
c/o Richard S. Holmes, Esq.,
Room 1817, 42 Broadway,
New York, New York.

United States Attorney,

By:

Chief Assistant United States Attorney,
Attorney for Respondent-Appellant,
Office & P. O. Address,
521 Federal Building,
Brooklyn, New York.

Clerk's Certificate

652 UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF NEW YORK, *ss.*:

I, PERCY G. B. GILKES, Clerk of the District Court of
653 the United States of America for the Eastern District of New York, do hereby certify that the foregoing is the record on appeal of the said District Court in the above-entitled matter as agreed on by the parties. The last day to file this record is February 1, 1948.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Eastern District of New York, this 28th day of January in the year of our Lord one thousand nine hundred and forty-eight and of the Independence of the said United States the one hundred and seventy-second.

654

Clerk.

Deputy Clerk.

[Seal]

[fol. 219] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex Rel. HAROLD E. HIRSHBERG, Relator-appellee,

against

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, N. Y., Respondent-appellant

SIR:

Please to Take Notice that upon the annexed affidavit of Francis A. McGurk, duly sworn to December 29, 1947, the undersigned will move this Court at a term thereof for the hearing of motions, duly appointed to be held in the United States Court House, Foley Square, Borough of Manhattan, New York city, on the 12th day of January, 1948, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the appeal of appellant above named under and pursuant to Rule 73 of the Federal Rules of Civil Procedure, upon the ground that the said appeal was not taken within sixty days from the making and entry of the order sought to be appealed from; and for such other and further relief as to the Court in the premisses may seem just and proper.

Dated, New York city, December 29, 1947.

Yours etc., Francis A. McGurk, Attorney for relator-appellee, Office and P. O. address: Room 1817, 42 Broadway, New York, N. Y.

To: J. Vincent Keogh, Esq., U. S. Attorney Eastern District of New York, Court House, Brooklyn, N. Y.

[fol. 220] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex Rel. HAROLD E. HIRSHBERG, Relator-appellee,

against

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, N. Y., Respondent-appellant

STATE OF NEW YORK,
County of New York, ss:

Francis A. McGurk, being duly sworn says:

That he is an attorney and counsellor at law and a member of the Bar of this Court, and is the attorney for the appellee above named.

That this motion is brought by appellee under the 22d Rule of the Rules of this Court to dismiss the appeal of appellant upon the ground that the same is not taken within the sixty-day limit provided for by Rule 73, subdivision (a) of the Federal Rules of Civil Procedure.

The appeal is sought to be taken by appellant from an order of the United States District Court for the Eastern District of New York, made and entered on September 29, 1947, sustaining a writ of habeas corpus, sued out by appellee, after conviction by a Naval General Court Martial. Judge Galston, who decided the case, filed a written opinion on September 26, 1947, which appears in the Advance Sheets of the Federal Supplement for December 15, 1947, beginning at page 990 thereof.

The respondent appeared in the habeas corpus proceedings by the United States Attorney for the Eastern District [fols. 221-222] of New York and the order sustaining the writ of habeas corpus with notice of entry thereof as of September 29, 1947, was duly served upon the United States Attorney for the Eastern District of New York on September 29, 1947 and a certified copy thereof was duly served upon the appellee, personally, on said September 29, 1947, when the relator was released from custody.

That the time of appellant to appeal from the aforesaid order of September 29, 1947, has fully expired and has in

no wise been extended, and the Notice of Appeal herein, dated December 23, 1947, served on deponent by mail and received by him on December 24, 1947, is of no effect, and the appeal should be dismissed.

Wherefore, deponent prays that this court make its order herein dismissing the appeal sought to be taken by the appellant above named.

Francis A. McGurk.

Sworn to before me this 29th day of December, 1947. Joan V. Egan, Notary Public, State of New York. Residing in Bronx County. Bronx Co. Clk's No. 57, Reg. No. 126-E-9. N. Y. Co. Clk's No. 333, Reg. No. 338-E-9. Commission Expires March 30, 1949.

[fols. 223-224] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Affidavit

Appeal No. 832

UNITED STATES OF AMERICA ex Rel. HAROLD E. HIRSHBERG, Relator-appellee,

against

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York, Respondent-appellant

STATE OF NEW YORK,
County of Kings,
Eastern District of New York, ss:

J. Vincent Keogh, being duly sworn, deposes and says:

That he is the United States Attorney for the Eastern District of New York, and is the attorney for the Respondent-Appellant herein.

That on September 29, 1947, an order was entered in the above-entitled proceeding in the United States District Court for the Eastern District of New York, which by its terms sustained the writ of habeas corpus sought by the

relator. A notice of appeal was filed with the Clerk of the United States District Court for the Eastern District of New York on December 23, 1947, and a copy was forwarded by mail to the attorney for the Relator-Appellee the same day.

That the notice of appeal was filed within the statutory limit of three months after the entry of the order herein (Title 28 U. S. C. A., Section 230).

Wherefore, deponent prays that this Court should deny the motion of Relator-Appellee for an order dismissing the appeal herein.

(S.) J. Vincent Keogh.

Sworn to before me this 9th day of January, 1948. William H. Sperling, Notary Public, Kings County Clerk's No. 49. Kings County Register's No. A-1074-S-8. Commission Expires March 30, 1948. (Seal.)

[fols. 225-226] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of January, one thousand nine hundred and forty-eight.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Calvert Magruder, Circuit Judges.

UNITED STATES ex Rel. HAROLD E. HIRSHBERG, Relator-appellee,

v.

CAPTAIN M. J. MALANAPHY, U. S. Navy, Commanding Officer, U. S. Naval Receiving Station, Brooklyn, New York, Respondent-appellant

A motion having been made herein by counsel for appellee to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 227] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 193—October Term, 1947

(Argued March 4, 1948. Decided April 9, 1948.)

Docket No. 20902

UNITED STATES OF AMERICA ex Rel. HAROLD E. HIRSHBERG, Relator-Appellee,

v.

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York, Respondent-Appellant

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from the District Court of the United States for the Eastern District of New York.

Habeas corpus proceeding on the relation of Harold E. Hirshberg against Captain M. J. Malanaphy, United States Navy, Commanding Officer at the United States Naval Receiving Station, Brooklyn, N. Y. From an order sustaining the writ, 73 F. Supp. 990, the respondent appeals. Reversed.

[fol. 228] J. Vincent Keogh, United States Attorney, for Appellant; T. Vincent Quinn, Assistant Attorney General, and O. S. Colclough, Rear Admiral, U. S. Navy, Judge Advocate General of the Navy, on the Brief; Frank J. Parker, Chief Assistant United States Attorney and Frederick Bernays Wiener, Special Assistant to the Attorney General, of Counsel.

Francis A. McGurk and John J. O'Neil, Attorneys for Appellee.

SWAN, Circuit Judge:

This is an appeal from an order sustaining a writ of habeas corpus and releasing the relator from the custody of the appellant, who held him in detention after his conviction by a naval general court-martial of violations of Article 8 of the Articles for the Government of the Navy,

34 U. S. C. A. § 1200, Art. 8 Second. The relator's petition for the writ challenged the jurisdiction of the court-martial on two grounds: (1) that when the alleged offenses were committed he was not subject to the jurisdiction of the United States Navy because he was then a prisoner of war of the Japanese in the Philippine Islands, and (2) that after commission of the alleged offenses his term of enlistment ended and he received an honorable discharge, and was thereby released from any liability for acts done during that enlistment, despite the fact that he reenlisted the following day. In an opinion reported in 73 F. Supp. 990, the district court overruled the first contention but sustained the second.

The facts are not in dispute. The relator enlisted in the United States Navy in 1936 and by reenlistment in 1941 [fol. 229] was still in such service, being stationed in the Philippine Islands, when the United States forces on Corregidor surrendered in May 1942. He thereby became a Japanese prisoner of war and remained such until he was liberated in September 1945. During this period his rating was that of Chief Signalman, which made him a Chief Petty Officer in the Navy.[1] After his liberation he was returned to the United States and received an honorable discharge by reason of the termination of his enlistment, effective at midnight on March 26, 1946. On the afternoon of the following day he reenlisted for a term of four years. Thereafter, in February 1947, he was served with charges directing his trial before a general court-martial convened by the Commandant, Third Naval District, for offenses alleged to have been committed between November 10, 1942 and March 1, 1944, while he was a prisoner of war of the Japanese. The trial was concluded on August 12, 1947; it resulted in his conviction on two specifications, and he was sentenced to 10 months' confinement, to reduction in grade to apprentice seaman, and to dishonorable discharge from the Navy. His petition for a writ of habeas corpus was filed August 18, 1947.

The relator's contention that the court-martial lacked jurisdiction because the offenses with which he was charged were committed while he was a prisoner of war, was cor-

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[1] 34 U. S. C. A. § 176; Bureau of Naval Personnel Manual, p. 82A, Art. D-5102.

rectly overruled by the district judge and there is no need to add to his opinion on this point.

Less easy of solution is the relator's other contention, namely, that the court-martial lacked jurisdiction to try him for offenses committed during an enlistment from which he had been honorably discharged. It has long been the rule that a member of the Navy or the Army who has [fol. 230] received an honorable discharge from service and been returned to civilian life cannot be tried by court-martial for offenses committed during his enlistment, except such offenses as are specifically withdrawn from the general rule by Article 14 of the Articles for Government of the Navy, 34 U. S. C. A. § 1200, Art. 14 or Article 94 of the Articles of War, 10 U. S. C. A. § 1566, Art. 94.[2] The offenses of which the relator was convicted were not of those specified in Article 14. And a subsequent reenlistment, no matter how soon after the discharge, does not revive the lost jurisdiction. See Winthrop, *Military Law and Precedents*, 1920 ed., 93; CMO 22—1917, page 7; CMO 12—1921, page 11; CMO 1—1926, page 9; CMO 12—1929, page 7. These rulings would be conclusive against the jurisdiction of the court-martial in the case at bar, were it not for section 334, Naval Courts and Boards, 1937.[3] This

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[2] See *Ex parte Wilson*, 33 F. 2d 214 (E. D. Va.); *Ex parte Drainer*, 65 F. Supp. 410, 411 (N. D. Cal.), aff'd sub nom. *Gould* v. *Drainer*, 158 F. 2d 981 (C. C. A. 9); *United States ex rel. Viscardi* v. *MacDonald*, 265 F. 695, 697 (E. D. N. Y.); *Durant* v. *Hironimus*, 73 F. Supp. 79, 85 (S. D. W. Va.).

[3] "* * * Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

volume was issued by the Secretary of the Navy March 4, 1937 and approved by the President March 5, 1937. Above the Secretary's signature appears the following direction:

> [fol. 231] "Naval Courts and Boards, 1937, is issued for the government of all persons attached to the naval service. It is hereby required and directed that all officers and other persons belonging to the Navy, so far as the duties of each are concerned, make themselves acquainted with, observe and comply with the provisions contained herein."

Section 591 of 34 U. S. C. A. provides that "The orders, regulations, and instructions issued by the Secretary of the Navy * * * with the approval of the President, shall be recognized as the regulations of the Navy * * *" Although section 334 of Naval Courts and Boards, 1937, is not in form an imperative declaration, it is, we submit, an "instruction" for the direction of naval personnel, for otherwise it would be meaningless to include it in a volume "issued for the government of all persons attached to the naval service," and so it has been construed in CMO 7—1938, page 42, and in the court-martial record of the case at bar. Section 334 is part of Chapter IV entitled "Instructions for Court Martial." The introductory section to this chapter, § 325, provides that "The provisions of this chapter are to be observed by general and summary courts martial, and * * * by deck courts." Being an "instruction," § 334 must be considered a "regulation" to which 34 U. S. C. A. § 591 "gives the force of law." *Denby* v. *Berry*, 263 U. S. 29, 37. So considered, it does not conflict with Article 14 Eleventh (Trial of offender after discharge), 34 U. S. C. A. § 1200 Art. 14. That provision subjects persons after discharge to prosecution for the ten offenses enumerated in Article 14, regardless of reenlistment; but this does not imply that persons who have committed other crimes and have thereafter reenlisted may not be subject to prosecution, if the "regulations" so provide.

[fol. 232] An enlistment is a contract. *In re Grimley*, 137 U. S. 147, 151. In reenlisting on March 27, 1946 the relator signed a paper which read in part as follows:

> "I also oblige myself, during such service, to comply with and be subject to such laws, regulations and

> Articles for the Government of the Navy as are or shall be established by * * * competent authority * * * ."

Thus section 334 of Naval Courts and Boards, 1937, which we have shown to be a "regulation" was expressly incorporated into his enlistment contract. Even without such express incorporation of existing regulations, we cannot doubt that by his enlistment he became subject to them. While the record does not appear to contain the paper signed by the relator at the time of his enlistment in 1941, we do not regard that as important since § 334 had already been promulgated. Hence the relator's honorable discharge on March 26, 1946 did not terminate the jurisdiction of the Navy to call him to account for offenses during that enlistment if he should reenlist, as he did the following afternoon. His consent to "subject" himself to all existing regulations answers any constitutional objection which can be raised.

As for the argument that a discharge is equivalent to an adjudication that he had not committed any offense, the case of *United States* v. *Landers*, 92 U. S. 77, shows that *United States* v. *Kelley*, 15 Wall. 34, did not go so far as that.

Order reversed with directions to dismiss the writ and remand the relator to the custody of the appellant.

[fol. 233] Dissenting opinion withdrawn and dissenting opinion on petition for rehearing substituted (see footnote 1 on page 1624).

[fols. 234-235] UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of April one thousand nine hundred and forty-eight.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES ex Rel. HAROLD E. HIRSHBERG, Relator-Appellee,

v.

CAPTAIN M. J. MALANAPHY, U. S. NAVY, etc., Respondent-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with directions to dismiss the writ and remand the relator to the custody of the appellant in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

No. 193—October Term, 1947

Docket No. 20902

UNITED STATES OF AMERICA *ex rel.* HAROLD L. HIRSHBERG,

Appellee-Petitioner,

—against—

CAPTAIN M. J. MALANAPHY, UNITED STATES NAVY, etc.,

Respondent.

PETITION FOR REHEARING

Now comes the appellee, and believing that the Court has erred in material respects in its prevailing opinion, and that a correction of such errors would lead to a different conclusion, respectfully requests a rehearing of this cause.

The grounds of this petition are as follows:

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(a) The error in the decision is predicated upon the erroneous conclusion that Article 334 of the Manual of Naval Courts and Boards, 1937, is an instruction to which Title 34 USCA, sec. 591, gives the force of law; and, perforce thereof confers jurisdiction on courts martial after separation of personnel from the navy by discharge and mustering out, thus repealing by administrative rule a long settled policy known to and sanctioned by the Congress.

2

(b) Courts martial are inferior courts of criminal jurisdiction, and jurisdiction may not be conferred upon them by agreement, contract of enlistment or waiver of the parties.

2

At midnight on March 26, 1946, appellee was a civilian, no longer subject to the AGN or courts martial until his reenlistment some 15 hours later. Therefore, (a) the rule *de minimis non curat lex* cannot confer jurisdiction; nor (b) the Court may not erect a criminal statute upon an executive instruction.

3

Holding as this Court does that Section 334 of Naval Courts and Boards, 1937, has the force of law, is to grant to the executive an illegal delegation of legislative power in violation of Article 1, Section 1 of the Constitution, and is also *ex post facto*.

1

(a) Page 158 of the Annual Report of the Secretary of the Navy for 1916 states that Naval Courts and Boards, 1910, is being revised and in the revised edition (1917), there will be copious notes covering legal questions that may be expected to arise before naval courts and boards, making that book a complete manual of procedure both as to law and forms, as well as incorporating therein new legislation amending the AGN.

In the similar report for 1917, page 142, it is stated that "*Navy Regulations and Instructions* are inaccurate or obsolete in some instances." A complete study of the

Regulations and *Instructions*" is being made "with a view to recommending that all necessary corrections * * * be made at the same time that certain considerable portions thereof will be stricken out when 'Naval Courts and Boards' is issued, as this publication will include all matter in the Regulations relating to courts and boards." (Italics supplied.)

From the foregoing it will be seen that Naval Courts and Boards is a highly specialized manual of instructions and is not of general application. This is apparent from the internal evidence thereof. It shows nothing of general application except to specialist personnel. In some respects it is a trial manual (pp. 168-169). The latter part is a form book. The duties of members of courts is defined (Chap. IV, p. 189). The duties of the Judge Advocate are defined beginning at Section 400. Legal ethics are set forth beginning at Section 360. But see Section 438. Nothing of interest to appellee or that he would be mindful of when he reenlisted, appears anywhere in the manual. Also, in 1917 when "U. S. Navy Regulations and Naval Instructions, 1913" was in effect, those parts thereof having to do with courts and boards were eliminated when the 1917 edition of the manual was published. The portions eliminated were instructions as to procedure, leaving the Navy Regulations, properly so-called (See Navy Regs. 1920), in the original work as of general application to naval personnel as distinguished from specialists, who were sent to law schools to equip them for special duties under naval law. (See p. 143, Ann. Rept. Sec. Nav. 1917.) The introduction of Secretary Daniels on the flyleaf of the 1917 edition of Naval Courts and Boards imports that the contents are instructions, and so does the index page, next following it. Hence with the instructions in 1917 severed from the 1913 "U. S. Navy Regulations and Naval Instructions," and their reap-

pearance in the 1917 edition of Naval Courts and Boards, which was not approved by the President, we have no force of law attributed thereto. But it will not be denied that they were then administrative instructions under Title 5, USCA, Sec. 22. We do not believe they have ever lost the virtue that Section 22 of Title 5 gave to them, or that it was ever intended that they should lose it. The counterpart of Section 334 of the 1937 edition except the last two sentences will be found in Section 25 of the 1917 edition.

The next edition of Naval Courts and Boards was in 1923. The counterpart of Section 334 in it will be found in Section 559 in Chapter 7, entitled: Instructions for Courts Martial. Section 559 contains footnotes and among them are the authorities and glosses thereof which purport, in catch lines, to state what the relevancy of *Ex Parte Joly*, 290 Fed. 858 is upon cases with similar facts arising in the navy in the future. It is assumed, as Judge Frank holds in his dissenting opinion, that this entire Court holds both the opinion in the *Joly* case and its gloss in footnote (30) to Section 559, *supra*, to be mistaken and erroneous. We attach to it the same condemnation, as well as to the second sentence in the same footnote, which places enlisted personnel upon the same footing as officers in the navy. Therefore, as CMO 7—1938, page 42 rests upon the *Joly* case and the sentence immediately following it in footnote (30), applying to enlisted men, rests upon it as well, then CMO 7 must, of necessity, be erroneous, too; for it can rise no higher than its erroneous premises or source.

Smith v. *U. S.*, 170 U. S. 372, 380, 381.

After the decision of the *Joly* case in 1922, the navy adhered to the settled law that only offenses under Article

14, AGN, survived discharge or mustering out, unless prosecution was begun in the enlistment in which the offenses transpired. With the exception of CMO 12 of 1921 (Appellee's br. p. 8), every court martial order cited in the brief of appellee on pages 8 to 11, was formulated thereafter. Under familiar rules, the navy must have reached those decisions with the *Joly* case in mind. Before the advent of CMO 7, 1938, the navy never acted in accordance with the *Joly* case. As late as May 22, 1947, the Secretary of the Navy, writing to the Speaker of the House of Representatives, urged, for the first time that we can discover, repeal of paragraph 11 of Article 14 of the AGN so that civil courts after discharge or dismissal, should alone have jurisdiction of offenses presently surviving thereunder (p. 2317).

> "On the other hand, it is proposed to provide that a discharge from the naval service shall not operate to terminate the jurisdiction of naval courts martial over a person for a crime committed in a previous enlistment from which he deserted. If such person enlists again under a false name and receives a discharge from the latter enlistment, such discharge terminates his last enlistment only. His previous enlistment from which he deserted was never terminated, and he may be tried during the statutory period, if any, for that desertion and other crimes committed in that enlistment period" (p. 2318).

On page 2317, *supra*, the Secretary informs the Speaker that Article 5, AGN Consolidates existing law as to jurisdiction of the person with the changes mentioned above. (See U. S. Cong. Documents, 80th Cong. vol. 7, 1947; No. 144, pp. 2317, 2318.) If those suggestions of the Secretary

upon the settled law become law, standing alongside of the present decision of this Court which places all offenses upon the same level of survivorship as Congress placed only those under Article 14, there will ensue a result the Secretary did not reckon. That letter does throw an important light upon the naval thought of the settled law and, more to the point, that it never did conceive of anything short of a Congressional fiat bringing about the repeal or change of the settled law. Whatever approaches the navy may have made towards making the change itself and unaided, were merely "sporting" suggestions. They were two in number. One of them in CMO 22, is in appellee's brief on pages 14 and 15. But the decision there is in accord with the settled law. The other case is in 31 OAG 521, at pages 528 and 529. There, too, the question posed was answered in accord with the settled law. The last named case is a counterpart of CMO 237, 1919, page 22, which is another buttress upon which rests CMO 7, 1938, page 42, cited at pages 16 and 17 of appellant's brief. CMO 237 was not briefed by appellee, because it was not available when the brief was written, but a comparison of it with 31 OAG, *supra*, will show that the question answered by the Attorney General was posed by the Judge Advocate General of the Navy.

This Court will not chop logic and hold that a true conclusion follows from false premises. If logic is chopped and CMO 7 is to stand, the more serious aspect of a deprivation of due process to appellee arises. It cannot be avoided by the conclusion that the enlistment contract incorporated Section 334 into it. If 334 is invalid to confer jurisdiction, what boots it that it was so incorporated in the enlistment contract? It does, however, make a difference on the question of waiver of a jury trial by appellee; for there was a hiatus between March 26, 1946

at midnight and late the following afternoon, when he was a civilian, and if he had committed a crime anterior thereto, it was properly referable to the civil authorities. (See page 18 appellant's brief, in the fine print.) Moreover, how could appellee waive his right to a jury trial by signing the enlistment contract in view of the hiatus argued above?

We do not concede that Section 334 was incorporated in the enlistment contract, nor that if not incorporated, appellee was subject thereto. As matter of law, appellee was not subject to the erroneous glosses which lie at the bottom of Section 334, and which, together with the authorities therefor, are patent in Section 559 of the 1923 edition, but are eliminated from the 1937 edition as the introduction thereto states.

But to return to the omission of *Instructions* from U. S. Navy Regulations and Naval Instructions, 1913: The remaining Regulations, properly so-called, may be entitled to the force of law perforce of the provisions of Section 591 of Title 34 USCA,

> *Gratiot* v. *U. S.*, 4 How. 80, 117, 118;
> *U. S.* v. *Symonds*, 120 U. S. 46, 50;
> 16 OAG 494, 497.

Force of law does not apply to the text of Naval Courts and Boards, which is a manual of instructions, forms and recommendations for the conduct of courts and boards by naval specialists. They are administrative merely, designed to guide those specialists who administer justice under the AGN. Naval Courts and Boards rather comes under and is authorized by Title 5, USCA, Section 22. The Judge Advocate General of the navy is an appointee of the Secretary. He is under his direction, and receives, revises and records courts martial, etc. records, and per-

forms such other duties as the Solicitor and Judge Advocate General formerly performed. He is not even a Bureau Chief (cf. Tit. 5 USCA secs. 428, 429). He is of the official household of the Secretary. The instructions to naval courts and boards in the manual are for the distribution and performance of navy business and the custody and preservation of its papers and records as provided in Title 5 USCA, Section 22. Hence, there is no necessity for the President to approve the manual. It was not approved in 1917. Its bearing Presidential approval thereafter does not lend to it any more sanction under the law, as we view it, than it would have under Title 5, Section 22, *supra*, nor is there any visible explanation for or requiring Presidential approval. The predecessors of the manual prior to 1917, were styled "Forms of Procedure for Courts and Boards in the Navy and Marine Corps." Editions thereof appeared in 1902 and 1910 without Presidential approval. It will be noted that Navy Regulations from 1865 down to the last edition in 1920 invariably in the introductions thereto by the Secretary refer for their issuance and approval to Section 1547 of the U. S. R. S. which is the former designation of Section 591 of Title 34 USCA.

The fixed and settled policy, which the opinion of the Court states would rule, if it were not for Section 334, cannot thus be lightly overruled. Congress is responsible for that policy, and the Congress must change it.

Panama R. R. Co. v. *Johnson*, 264 U. S. 375, 384;
Iselin v. *U. S.*, 270 U. S. 245, 250, 251;
Hecht Co. v. *Bowles*, 321 U. S. 321, 328, 329;
U. S. v. *G. Falk & Bro.*, 204 U. S. 143;
Nat. Lead Co. v. *U. S.*, 252 U. S. 140;
U. S. v. *Barnes*, 222 U. S. 513, 520.

The Congress enacted important changes, as the Secretary states (1916 Annual Rept. p. 158) in the law affecting the Navy, but it never changed the policy evolved from subdivision 11 of Article 14 AGN; neither did it enact Section 334 of Naval Courts and Boards, 1937. Nor is the Congress responsible for the mistaken gloss of the navy which the author of that gloss rests upon *Ex Parte Joly*. It is not a matter of asking the Congress to change a bad or an ineffective law. Rather, it is a question of what appears to be, but in fact is not, an instruction, suddenly cropping up as the genuine article, and the Court endowing it with force of law. This Court puts itself in the position of giving two catch lines in Section 334 the force and effect of law. Under Section 591 of Title 34 USCA, the Congress never meant for the Secretary of the Navy to be endowed with so much power.

Fleming v. *McCurtain*, 215 U. S. 56;
McBoyle v. *U. S.*, 283 U. S. 25, 26;
Duparquet Co. v. *Evans*, 297 U. S. 216, 218, 220-221;
Olmstead v. *U. S.*, 277 U. S. 438, 469;
Milwaukee Pub. Co. v. *Burleson*, 255 U. S. 407, 438;
N. Y. Trust Co. v. *Eisner*, 256 U. S. 345, 349;
16 OAG 494, 497.

(b) Courts martial are inferior courts of criminal jurisdiction, which must appear from their own trial minutes and no presumption of jurisdiction in their favor exists.

McClaughry v. *Deming*, 186 U. S. 49;
Naval Courts and Boards, Secs. 327, 328, 335.

What has been argued under (a) *supra*, with regard to incorporating Section 334 in the contract of enlistment applies here with equal vigor. If the last two sentences of that section crept into it as shown in the 1923 edition, and Judge Frank in his dissent here, states, it is agreed they are erroneous, it is difficult to see by what process the incorporation of the useless can have on the jurisdiction of the offense by the court martial. *Utile per inutile non vitiatur.* If this Court are agreed that the last two sentences of Section 334 are nullities, therefore, it follows, the court martial had no jurisdiction, and there is every reason for this Court to change its present ruling.

Waiver may give a court jurisdiction of the person, but it cannot clothe a court with jurisdiction of the offense.

> *Ver Mehren* v. *Sirmyer*, 36 Fed. (2) 876, 879, 880;
> *Dyrant* v. *Hironimus*, 73 Fed. Supp. 79, 87, 88;
> *Ex Parte Reed*, 100 U. S. 13, 23.

Lack of jurisdiction is frankly and openly confessed by appellant in the fine print on page 18 of his brief, where it is conceded that in the interval between midnight of March 26, 1946 and late the next afternoon, if a criminal offense had been committed by appellee, the navy would not have had jurisdiction of it, nor of him, and this despite the provisions of Article 22 AGN. Then, may we ask what caused this loss of jurisdiction if it was not discharge and mustering out of the Navy? That is precisely what caused it, and if could not be regained by reenlistment.

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(a) After midnight on March 26, 1946 appellee became a civilian and the navy and its courts martial lost jurisdiction completely. As we have seen, *Ex parte Jolly* and

CMO 7, 1938, *supra*, have no force or effect notwithstanding Section 591 of Title 34 USCA. Therefore, it follows that in the plan of decision of this Court there has been eliminated from competition with the settled law, sanctioned by Congress, the attribution of a repealing statute to Section 334 of Naval Courts and Boards, 1937, and the decision should be changed.

The rule *de minimis* may not be applied to fill out the hiatus intervening March 26, 1946 at midnight and late the next afternoon, for the reason, as heretofore argued: When appellee became a citizen at midnight on March 26, 1946, it is conceded the navy lost jurisdiction, and the civilian rights of appellee came into being, and among them was the right to a jury trial of any offense not outlawed by the civilian statute of limitations. Also, to apply that rule would confer jurisdiction on the court martial by this Court, colliding with *McClaughry* v. *Deming*, 186 U. S. 49; *Runkle* v. *U. S.*, 122 U. S. 543 and Sections 327, 328, 335 and 438 of Naval Courts and Boards, 1937.

(b) Lack of jurisdiction, as heretofore argued, may not be supplied by making Section 334 a repealer of the settled law. If that is the theory of the prevailing opinion, and we see no escape from it, then the ultimate effect is twofold, viz., the settled law is repealed and this Court erects a criminal statute on Section 334. There are no common law federal crimes, and therefore, Section 334 as a criminal statute collides with

U. S. v. *Eaton*, 144 U. S. 677;
Kraus Bros. v. *U. S.*, 327 U. S. 614, 620;
U. S. v. *Sutter*, 160 Fed. (2) 754, 756.

If, as set forth in 2 (b), *supra*, we correctly apprehend the force and effect of the prevailing opinion, namely, it endows Section 334 with the force of a repealing statute and erects upon it a criminal law, there is thereby given to the executive department of the government legislative power, which, under the Constitution, it never had and was never intended to have under Article 1, Section 1. Moreover, the Navy Department, never for one moment down to May 22, 1947, not quite a year ago, contended for the power to legislate. (See Letter of Sec. Nav. to Speaker of H. R., *supra*, under 1 (a) of this petition.)

See also: *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 415, *et seq.*

If our argument is a valid one thus far, then the usurpation of jurisdiction after discharge and mustering out would, as to appellee, be *ex post facto* and void.

However, if this Court in its wisdom should deny this application, or granting it should adhere to its present decision, then appellee requests a further stay of the mandate in this case for thirty days after the decision upon this application comes down, under the provisions of Rule XXXI of the Rules of this Court, in order that appellee may petition the Supreme Court of the United States for a writ of certiorari to review the determination of this Court.

Respectfully submitted,

FRANCIS A. MCGURK, and
JOHN J. O'NEIL,
Attorneys for Appellee.

Certificate

We certify that this petition for rehearing in our opinion, is well founded in fact and law, and that it is not filed for the purpose of delay.

FRANCIS A. MCGUIRK
JOHN J. O'NEIL

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

No. 193—October Term, 1947

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,
Relator-Appellee,

v.

CAPTAIN M. J. MALANAPHY, UNITED STATES NAVY, COMMANDING OFFICER, UNITED STATES NAVAL RECEIVING STATION, BROOKLYN, NEW YORK,
Respondent-Appellant.

APPELLANT'S MEMORANDUM IN ANSWER TO APPELLEE'S PETITION FOR REHEARING

This memorandum is submitted pursuant to the Court's request that appellant reply to appellee's petition for rehearing, wherein appellee asserts that the opinion heretofore filed is erroneous on several grounds.

As we read the petition for rehearing, the points urged are, first, that *Naval Courts and Boards, 1937*, does not have the force of law; second, that, in any event, Article 334 of that publication was not designed as an instruction changing the rule as to jurisdiction over reenlisted naval personnel in respect of offenses committed in prior enlistments; and, third, that even if a change of rule had been intended, the jurisdiction of naval courts-martial cannot be enlarged by any such executive act.

In our view, none of these points is well taken.

I

Naval Courts and Boards, 1937, is a regulation having the force of law.

R. S. 1547 (34 U. S. C. 591) specifically provides that—

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

As an original proposition, having regard to the old and well-recognized principle that the direction of the President is to be presumed in all instructions and orders issuing from the head of the competent department concerned (7 Op. Att'y Gen. 453, *per* Cushing, A.G.), it was never questioned that instructions for the conduct of naval courts-martial issued by the Secretary of the Navy had the force of law; and so its was ruled in *Ex parte Reed*, 100 U. S. 13.

In that case, the Supreme Court had under consideration a compilation entitled "Orders, Regulations, and Instructions for the Administration of Law and Justice in the United States Navy," which had been promulgated in 1870 by the Secretary of the Navy. The Secretary's notation of approval contained no suggestion of submission to the President,[1] yet the Supreme Court without hesitation

[1] "The following Orders, Regulations, and Instructions are approved and all Circulars, General Orders, and Regulations which conflict with them are hereby rescinded.

"GEO. M. ROBESON,
Secretary of the Navy.

"NAVY DEPARTMENT, *April* 15, 1870."

held that the compilation had the force of law. 100 U. S. at 22.

Thereafter, beginning in 1893 and until the appearance of the first *Naval Courts and Boards*, instructions for courts-martial were included in Navy Regulations proper. Consideration of appellee's contentions on rehearing requires, at this juncture, a bibliographical survey.

The last Navy Regulations antedating the issuance of *Naval Courts and Boards* were published in 1913. They were in two parts. The first, printed on blue paper, were the "Regulations for the Government of the Navy of the United States," or *Navy Regulations* proper they were approved by the President for the *government* of all persons attached to the naval service.[2] The second part, printed on white paper, was entitled "Instructions for the Administration of the Naval establishment of the United States." These *Naval Instructions* were issued by the Secretary, without reference to the President, for the

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2 "NAVY DEPARTMENT,

Washington, D. C., January 25, 1913.

"The President having approved the following regulations, they are issued, in accordance with the provisions of section 1547 of the Revised Statutes of the United States, for the government of all persons attached to the naval service.

"All amendments to these regulations that are believed to be necessary or desirable shall be submitted to the department, accompanied by a full Statement of the reasons for the proposed change and the effect thereof.

"G. v. L. MEYER,

"Secretary of the Navy."

guidance of the naval service.[3] Instructions for courts-martial and boards were included in the blue *Navy Regulations* which had received presidential approval.[4] Forms of procedure for courts and boards in the Navy and Marine Corps were included in a separate publication, prescribed by the Secretary alone for the *information and guidance* of the naval service.[5]

With the outbreak of World War I, *Naval Courts and Boards, 1917*, was hastily prepared for the use of naval personnel. Part I thereof, "Instructions for Courts and Boards in the Navy," superseded the matter theretofore contained in the blue *Navy Regulations*. Part II, "Proce-

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3 "NAVY DEPARTMENT,
"WASHINGTON, D. C.,
"January 25, 1913.

"The following instructions for the administration of the Naval Establishment of the United States (Naval Instructions) are issued for the guidance of the naval service as to the detailed methods to be employed in carrying out the provisions of the current edition of the Navy Regulations.

"Changes in or corrections to these instructions will be issued from time to time as may be necessary. When of a minor nature, corrections will be made to the text as it stands, by insertions, changes or removals; when of considerable length, new pages will be issued; these shall be inserted in the binder to replace the designated pages, which latter need not be preserved.

"G. v. L. MEYER,
"Secretary of the Navy."

4 Ch. 4, Boards; ch. 5, Courts of Inquiry; ch. 6, Deck Courts; ch. 7, Summary Courts-Martial; ch. 8, General Courts-Martial; ch. 9, Limitation of Punishment.

5 *Forms of Procedure for Courts and Boards in the Navy and Marine Corps* (1910), p. 3: "The following forms of procedure for courts, boards, etc., based largely upon previous publications on the same subject, are approved and published for the information and guidance of the naval service. While the phraseology used need not be absolutely adhered to, yet the procedure laid down should be strictly followed, as it has received the Department's approval and deviation therefrom may be fatally irregular and erroneous.

"G. v. L. MEYER,
"Secretary of the Navy."

dure for Courts and Boards in the Navy," superseded the 1910 edition of *Forms of Procedure*. But although a portion of the new *Navy Courts and Boards* replaced presidentially-approved *Navy Regulations*, the new publication was not approved by the President, and was issued by the Secretary for *guidance* only.[6] Therein lay the seeds of a future difficulty.[7]

A provision of *Navy Regulations* adopted in 1915 was, by order of the President, January 14, 1916, stricken from those Regulations. Thereafter it was embodied in *Naval Courts and Board, 1917*. When that provision came before the Supreme Court in *Denby* v. *Berry*, 263 U. S. 29, 37-38, the Court held that it did not have the force of law—a consequence of the President's not having approved *Naval Courts and Boards, 1917*.

In 1923, while the *Berry* case was pending in the courts, a new edition of *Naval Courts and Boards* was issued. This edition, unlike the previous one, was approved by the Secretary and by the President as well, and was issued for the *government* of all persons attached to the

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[6] "NAVY DEPARTMENT,
"*Washington, August 18, 1917.*

"'Naval Courts and Boards' is approved and published for the guidance of the naval service. It supersedes 'Forms of Procedure for Courts and Boards in the Navy and Marine Corps, 1910,' and the regulations and instructions applying exclusively to naval courts and boards heretofore contained in the Navy Regulations.

"JOSEPHUS DANIELS,
"*Secretary of the Navy.*"

[7] By Changes No. 10, effective February 25, 1918, chapters 4-9, inclusive, were, following the publication of *Naval Courts and Boards*, removed from *Navy Regulations*, 1913.

naval service.[8] And *Naval Courts and Boards, 1937*, now in force, was similarly approved (Opinion, pp. 1214-1215).

Consequently since, unlike the 1917 edition considered in *Denby* v. *Berry*, 263 U. S. 29, the 1937 revision was approved by the President and issued for the government of the naval service, it follows, that, as the Court held, *Naval Courts and Boards, 1937*, is a regulation having the force of law.[9]

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[8] "DEPARTMENT OF THE NAVY,
"*Washington, 8 January, 1923.*

"'Naval Courts and Boards, 1923' is issued for the government of all persons attached to the naval service.

"It is hereby required and directed that all officers and other persons belonging to the Navy; so far as the duties of each are concerned, make themselves acquainted with, observe, and comply with the provisions contained herein.

"This book supersedes 'Naval Courts and Boards, 1917.'

"EDWIN DENBY,
"*Secretary of the Navy.*

"THE WHITE HOUSE,
"*January 9, 1923.*

"Approved:

"WARREN G. HARDING."

[9] *Accord*, as to the 1923 edition: CMO 10 of 1927, pp. 4, 10.

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II

Article 334, Naval Courts and Boards, 1937, was intended to announce to the service the rule that Naval Courts had jurisdiction over reenlisted personnel in respect of offenses committed in previous enlistments.

The portions of *Naval Courts and Boards, 1937*, now in question are the last three sentences of Article 334, as follows:

> * * * Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N.

Those three sentences do not appear in Art. 559, *Naval Courts and Boards, 1923*. Appellee's contention, that adding them to the 1937 edition does not amount to an instruction, must be examined in the light of rulings made between 1917 and 1938.

Through 1929, as we indicated in our original brief, the Judge Advocate General of the Navy held that a reenlistment in the Navy did not render a sailor amenable to trial by court-martial in respect of an offense committed in a previous enlistment. CMO 22 of 1917, pp. 7-8 (*semble; dubitante*); CMO 12 of 1921, p. 11; CMO 1 of 1926, p. 9; CMO 12 of 1929, p. 7. Thereafter, in similar cases, the jurisdiction was sustained. Sgt. Jacob G. Keller, USMC, GCM record No. 75740 (1932); Pvt. George C. Smith, USMC, GCM record No. 76425 (1934); M1c. Archie L. Hammock, USN, GCM record No. 77457 (1936). These cases were the basis for the last sentence quoted from Art. 334, *supra*. They were followed, in similar vein, by those of CMM Everett W. Wyatt, USN, GCM record No. 78075 (1938) and of Ocheltree, the latter published in CMO 7 of 1938, p. 42.

There was a change, therefore, between 1929 and 1932. Although Court-Martial Orders in the Navy are not approved by the President, Art. 74 (4) of the presidentially approved *Navy Regulations*, 1920, provides that they "shall have full force and effect for the guidance of all persons in the Naval Establishment," and Art. 5 (c) of *Naval Courts and Boards, 1937*, also presidentially approved, further provides that "officers of the naval service are responsible for the observance of instructions contained therein, just as they are for the observance of other lawful regulations."

We have then a situation where the Secretary of the Navy, with the approval of the President, has said that "the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N." That statement appears in a publication "issued for the government of all persons attached to the naval service,"

which requires that "all officers and other persons belonging to the Navy * * * comply with the provisions contained therein." That statement is thereafter interpreted by the Secretary of the Navy, who signs Court-Martial Orders,[10] to mean just what it says, *i.e.*, that similar cases will also be held legal in the future. In those circumstances, it seems to us perfectly clear that a like rule was to be followed until a change was duly promulgated. As the court indicates (p. 1215), inclusion of the provision in *Naval Courts and Boards, 1937*, would otherwise be meaningless.[11]

III

Article 334, Naval Courts and Boards, 1937, does not exceed the limits of executive power.

Appellee argues (Pet. 2) that "the Court may not erect a criminal statute upon an executive instruction." The short answer is that the Court has not done so.

Appellee was punished for violation of an Act of Congress, viz., AGN 8 (Second). The court-martial which tried him was lawfully constituted, it had jurisdiction of his person and of the offense charged, and its sentence did not exceed the limits permitted by law. The alleged lack of jurisdiction now contended for derives from an essentially intramural rule, the creation of Byt. Maj. Gen. Holt,

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[10] Art. 74 (3) (d), *Navy Regulations*, 1920.

[11] Whether the preceding sentence of Art. 334, *Naval Courts and Boards, 1937*, misreads *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.), as Judge Frank urges (pp. 1219-1220), seems to us quite immaterial. Changes in the law frequently result from precedents reread, perhaps misread, in order to achieve an apparent doctrinal consistency. The President and the Secretary of the Navy should be as free as Article III judges are to draw upon approved techniques of the *elegantia juris* in respect of their judicial functions.

Judge Advocate General of the Army from 1862 to 1875. See *United States* v. *Kelly*, 15 Wall. 34. That rule was not required by statute. It was not required by any judicial decision dealing with the jurisdiction of courts-martial. But it was slavishly copied by the Navy—until 1932.

At best, the early rule was a self-imposed limitation enforced by the services, apparently with a view to enhancing the value of an honorable discharge. But it was an unrealistic rule. In earlier times, when a soldier served a full enlistment in a small company, or a sailor on board a single vessel, an honorable discharge issued by an officer constantly present might well be "a formal final judgment passed by the government upon the entire military record of the soldier" or sailor. *United States* v. *Kelly*, 15 Wall. at 36. But under modern conditions, where a soldier would pass through half a dozen units before separation, or where a sailor who might have spent his entire service at sea would normally and routinely be discharged at a receiving station—a shore establishment—these consequences did not in fact attach to an honorable discharge. To urge that they should so attach as a matter of law necessarily involves the contention that a mass-produced document is to be given the threefold effect of (a) a shorter statute of limitations; (b) a pardon for undetected crime; and (c) an estoppel against the sovereign. It was for these reasons that the Navy, having regard to modern conditions of discharging enlisted personnel, refused after 1932 to give effect to the older self-imposed restriction on the jurisdiction of its courts-martial.

As the opinion of the Court points out (p. 1216), no constitutional question arises. As to appellee, the new rule was not *ex post facto*. There is a constitutional question (though not, in our view, a substantial one) in the application of AGN 14 or AW 94, but that only because

in those circumstances the accused has been separated from the service, has become a civilian, and the saving clauses in AGN 14 and AW 94 subject this civilian to naval or military jurisdiction in respect of offenses committed while he was in the naval or military service. Here, however, appellee was not a civilian when tried; he was back in the service; and his only defense is that his offense was committed in a prior enlistment. The question of the sufficiency of that defense, howsoever it may be determined, clearly does not involve any interpretation of the Constitution.[12]

The difference between the present case and one arising under AGN 14 is also underscored by the instance—suggested at the argument—of an American committing an offense in Canada and returning to the United States. Canada cannot try him while he remains in the U. S. A.; Canada must extradite him. So, if a sailor commits an offense while in the Navy and then by discharge becomes a civilian, he cannot be tried by naval court-martial unless his offense falls within AGN 14 so that he can in effect be "extradited" back into the Navy. But if the American offender returns to Canada, he has resubmitted himself to the Canadian jurisdiction, and he cannot defend on the ground that, between offense and trial, he was in the United States. So here: when appellee reenlisted, the

[12] Nor can we agree with Judge Frank's view (p. 1219) that there was involved in this case "the right to trial by jury in a criminal suit." The offense was committed in the Philippines, where there has never been any "right" to trial by jury (*Dorr* v. *United States*, 195 U. S. 138), and which was an independent Republic at the time of appellee's trial by court-martial. Or, if jurisdiction was in a federal court in the United States by virtue of the "first found" clause of the Judicial Code (Jud. Code § 41, 28 U. S. C. 102; see 28 Op. Att'y Gen. 24), then, having in mind that appellee had reenlisted, the contention must be that although he could not claim jury trial in respect of offenses committed in the present enlistment, he still had a "right to trial by jury in a criminal suit" in respect of offenses committed in a prior enlistment.

circumstance that he had been fifteen hours a civilian did not deprive the naval court-martial of power to try him for offenses committed in the prior enlistment.

CONCLUSION

The decision of the Court was correct, and the petition for rehearing should be denied.

Respectfully submitted,

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Of Counsel.

[fol. 261] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 193

(Petition Filed April 20, 1948. Decided June 2, 1948)

Docket No. 20902

UNITED STATES OF AMERICA ex Rel. HAROLD E. HIRSHBERG, Appellee,

v.

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York, Appellant

Before L. Hand, Swan and Frank, Circuit Judges

On Petition for Rehearing

Francis A. McGurk and John J. O'Neil, Attorneys for appellee, petitioner.

Frederick Bernays Wiener, Special Assistant to the Attorney-General, for appellant.

[fol. 262] Per CURIAM:

Upon rehearing the relator contends (1) that Naval Courts and Boards 1937 does not have the force of law; (2) that Article 334 of that publication was not intended to change the rule as to jurisdiction over reenlisted naval personnel in respect to offenses committed during a prior enlistment; and (3) that if such change was intended, the jurisdiction of naval courts-martial cannot be enlarged by such executive action. The argument upon rehearing has left a majority of the court of the same mind as formerly, and as to points (1) and (2) we see no reason to add to our original opinion.

The argument in support of point (3) is built largely on AGN 14 which permits trial by court-martial for the offenses listed therein, although the defendant has been honorably discharged; the implication being, the relator asserts, that for no other offenses can he be so tried after discharge. We think this a non sequitur. It is true, of course, that a civilian cannot be tried by court-martial. Once clear of the Navy by his discharge, the Navy has no

further power over former naval personnel; and it was for that very reason that AGN 14 had to reserve jurisdiction expressly. But when a man reenlists he subjects himself to courts-martial generally, and the only question is whether their jurisdiction is limited to offenses committed thereafter. Upon that question no light is thrown by the fact that it was necessary expressly to retain by AGN 14 court-martial jurisdiction over the person after a man had been discharged from the Navy and while he remained a civilian. In the case of the relator, court-martial jurisdiction existed over the offense and over his person when he committed the acts complained of; when he was discharged jurisdiction over his person was lost; when he reenlisted jurisdiction over his person was restored. *A priori* there is no reason to say that because there was a period—in this case a mat-[fol. 263] ter of hours—when the court-martial had no jurisdiction over his person, that its jurisdiction, when restored, is not complete both as to subject matter and as to person. The analogy suggested by counsel for the appellant seems apposite: namely, that of a defendant who commits a crime in Canada, escapes to the United States, and then returns to Canada; he cannot defend on the ground that between the offense and the trial he was beyond the jurisdiction of the Canadian court. We find nothing in AGN 14 which by implication reduces the preexisting jurisdiction of the court-martial. We submit that the question is not of jurisdiction of the court-martial but of whether an honorable discharge operates as a pardon; and it does not.

The relator argues that in any event we should yield to the long-standing administrative interpretation that reenlistment does not restore court-martial jurisdiction over prior offenses. Apparently such has been the interpretation in the Army up to the present time, and such was the interpretation in the Navy until about 1932, but then there was a volte face and a precisely opposite interpretation which is now incorporated in Article 334 of Naval Courts and Boards 1937. We must distinguish between taking administrative interpretation as evidence and as changing the statute. The latter can never be done administratively. Hence the sole office of administrative interpretation is as evidence of those who must constantly deal with the statute, and whose understanding of it is likely to be right in cases of doubt. It is not as if the Navy's interpretation from 1862 to 1932 enacted the statute in that form and its opposite

interpretation from 1932 to 1948 were an invalid attempt to amend it. On the contrary the Navy has had two interpretations and their later one seems to us permissible and preferable.

We adhere to our former judgment.

[fol. 264] FRANK, Circuit Judge, dissenting:

1. I dissent solely with respect to the power of the court-martial to try appellee. I think it will help, in order to bring out that issue sharply, to report (as my colleagues have not done) the contentions of appellant's counsel (speaking for the Navy) in his briefs and in his oral argument on rehearing.[1]

(1) The Navy (as distinguished from my colleagues) freely concedes that 34 U. S. C. A. §591 has nothing to do with this case. Appellee's counsel on oral argument admitted that that provision of the statute creates no power, by a "regulation" or otherwise, to widen the statutory scope of a court-martial; that nowhere else in the statute can such power be found; and that, therefore, §334 of Naval Courts and Boards, 1937, in no way purported to relax any statutory restrictions on courts-martial contained or implied in 34 U. S. C. A. §1200 (*i. e.*, the Articles for the Regulation of the Navy). The authorities, I think, plainly require that concession. They hold that regulations under 34 U. S. C. A. §591 "must be consistent with" other provisions of the statute,[2] and they thus construe 34 U. S. C. A. §591 identically with 5 U. S. C. A. §22. The latter has been held to confer "administrative power only," not legislative; to authorize no regulations which "extend a statute or modify its provisions."[3] It is easy, therefore, to under-

[1] Because of the position of counsel for appellant on rehearing, I have withdrawn my earlier dissenting opinion and have substituted what appears in the text.

[2] *United States* v. *Symonds*, 120 U. S. 46, 49; *Glavey* v. *United States*, 182 U. S. 595, 605-606; 13 Op. of Atty. Genl., 9, 12; 30 Op. of Atty. Genl., 234, 237-238.

[3] *United States* v. *Eaton*, 144 U. S. 677, 687; *Merrill* v. *Jones*, 106 U. S. 466, 467; *United States* v. *George*, 228 U. S. 14, 20-22; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215; *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 515; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

stand why counsel for appellant admitted that, as to naval [fol. 265] courts-martial, the power of the executive is no greater than that expressly granted as to Army courts-martial by 10 U. S. C. A. §1509, *i. e.*, by regulation to prescribe no more than the procedure and rules of evidence.

(2) The Navy Articles were enacted by Congress in 1862. The Army Articles (as amended now found in 10 U. S. C. A. Ch. 36) had been previously enacted. Appellant's counsel concedes that, beginning in 1862, the Judge Advocate Generals of the Army repeatedly published rulings—which (says appellant's counsel) were "slavishly copied by" the Judge Advocates of the Navy—to the following effect: Except as to offenses (involving fraud and the like) described in Article 94 of the Articles of War[4] and Article 14 of the Navy Articles,[5] one who has received an honorable discharge and who has re-enlisted—no matter how soon after his discharge[6]—cannot legally be tried by a court-martial for an offense committed during his earlier enlistment. To that position, we are told; the Army has adhered, without deviation, for 86 years, *i.e.*, from 1862 to the present. The Navy similarly adhered to that position for at least 70 years (1862-1932). In his brief, appellant's counsel says, "The traditional rule is stated in the Army's Manual for Courts Martial (1928) par. 10, as follows: 'The general rule is that court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense com-[fol. 266] mitted during a period of service thus terminated is not revived by a re-entry into the military service.'" Winthrop, Military Law and Precedents (2d ed. 1896), the standard text on the subject, officially endorsed by the Army, says (p. 124): "Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th Article [now Art. 94], it is the opinion of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation

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[4] 10 U. S. C. A. §1566.

[5] 34 U. S. C. A. §1200, Art. 14.

[6] The length of the interval between discharge and reenlistment cannot have any materiality; I understand my colleagues to assent to that proposition.

therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States (while it may of course continue to hold him liable for a pecuniary deficit), must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offences, but the same would properly be considered as finally lapsed.'

(3) But, it is said, in decisions of naval courts-martial beginning in 1932, the Navy adopted a different attitude which (it is urged) was embodied as an instruction in §334 of Naval Courts and Boards 1937, issued by the Secretary of the Navy with the approval of the President.[7]

(4) Seeking to minimize the legal effect of the long-continued rulings of the Judge Advocate Generals—which de- [fol. 267] clared unequivocally that a court-martial lacks statutory power over a person like appellee—counsel for appellant argues thus: Those rulings were not official interpretations of the statute; they were but statements of policy reciting a mere self-imposed administrative restriction; consequently, the change said to have been made by the Navy, beginning in 1932, was but a reassertion of a statutory power which had existed ever since 1862.

2. Undeniably, however, those Judge Advocate General rulings were never uttered as statements of policy. Always they took the explicit form of official interpretations of the intent of Congress as voiced by it in the Articles. Thus here we have not a simple failure to exert authority, but positive, widely-published, announcements by the highest law-

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[7] So far as the Secretary was concerned, there was no indication of a change by the Navy until at least 1937. For the decisions before that date, cited by appellee, were not in the form of any C. M. O. (a Court-Martial Order, approved by the Secretary) but merely in the form of a G. C. M. (a General Court-Martial Order of an Army Headquarters, not approved by the Secretary). The references in §334 of Naval Courts and Boards, 1937, were merely to G. C. M. decisions. Not until 1938 (C. M. O. 7 of 1938, p. 42) was there any ruling by the Secretary which accords with my colleagues' interpretation of the statute.

officers of the Army and Navy that Congress had not conferred such authority. Of course, if the statute plainly and unambiguously created that power, such interpretations would be irrelevant. However, Navy Article 14 Eleven, to say the least, raises doubts as to the existence of that power. For it specifically provides that a person guilty of certain specified offenses (with none of which appellant is charged) shall continue to be subject to court-martial notwithstanding his honorable discharge, and this suggests that such a discharge wipes out court-martial jurisdiction as to all other offenses. I do not say that Article 14 settles the question; one may argue, as my colleagues do, that perhaps Congress there intended to deal merely with discharged men who do not re-enlist. I say only that Article 14 left the statute's meaning, as to jurisdiction, ambiguous to such an extent that official interpretations, first announced contemporaneously with its enactment and then followed for many years, must be given great weight.

With the statutory ambiguity thus existing, I find it impossible to square my colleagues' decision with *Trade Com-*
[fol. 268] *mission* v. *Bunte Bros.*, 312 U. S. 349. There, after a practice, continuing for 25 years, of not enforcing a statute with respect to certain intrastate transactions, the Commission changed its position and sought to assert such authority. In construing the statute against the Commission, the Supreme Court said (at pp. 351-352): "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred."[7a] The position here taken by the Navy is far

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[7a] See also *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 580, note 17: "Even negative construction may be significant. *Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351-352." *Cf. U. S.* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, 13.

weaker than was that of the Federal Trade Commission; for, as to that body, there was but "the want of assertion of power," while the Navy, for at least 70 years, again and again affirmatively declared that it lacked the statutory power it now claims.

3. Especially in the light of subsequent decisions, I take it that the *Bunte* doctrine is not to be glibly applied.[8] But here there are considerations which make the application of that doctrine peculiarly pertinent: Unlike the *Bunte* case, here there is involved the personal liberty of a citizen. After his discharge (and during his re-enlistment, within [fol. 269] the period of the statute of limitations) he could have been indicted and tried in a civil court.[9] In that event, he would have been entitled to a trial by jury. The Navy's present interpretation of the statute, which my colleagues approve, would, then, deprive appellee of the privilege to be tried by a jury. Moreover, this broad interpretation is repugnant to a public policy, with its roots deep in our history, adverse to any unnecessary extension of the authority of military courts.

4. There is also the following important consideration: The Executive, under this statute, was given no power to make regulations affecting the scope of a court-martial. Consequently we do not have here a case of the exercise of "continuing rule-making power."[10] We do have official interpretations, by those to whom enforcement of the statute was entrusted, made simultaneously with the enactment of the statute and thereafter long continued.[10a] To this must be added the important fact that, after these official interpretations had been publicly reiterated for many years, Congress re-enacted the statute.[11] A statutory re-enactment does not freeze administrative rule-making power; for, if an official is given delegated authority, pursuant to

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[8] See *United States* v. *American Union Transport*, 327 U. S. 437, 455, note 18.

[9] See 28 U. S. C. A. §102; 28 Op. of Atty. Gen. 24; *cf. United States* v. *MacDonald*, 265 F. 695, 697.

[10] See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100.

[10a] See, *e. g.*, *Billings* v. *Truesdell*, 321 U. S. 542, 552; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549; *Gray* v. *Powell*, 314 U. S. 402.

[11] See the next paragraph of the text of this opinion.

a statutory standard, to make regulations, Congress, by re-enacting the statute, is not to be deemed to have commanded that one of several alternative exercises of such delegated legislative authority is thereafter to be the ex-
[fol. 270] clusive mode of exercising that authority.[12] But, when officials, in charge of the enforcement of a statute, and having no delegated authority whatever to make rules as to its application, give the statute a notorious interpretation, and Congress then re-enacts the statute, Congress, I think, is to be deemed to have adopted, as its own, that previously well-publicized official interpretation.

I think it pertinent that, as is well-known, the Congressional Committees in charge of legislation relating to the armed forces are peculiarly well informed as to matters affecting them. It is, therefore, most unlikely that those Committees did not know of the official interpretations when the statutes were re-enacted. It should be noted that Winthrop, Military Law and Precedents (2d ed. 1896) had been republished by the Government Printing Office early in 1920, by order of the Secretary of War "for the information of the service," and that the Army Articles were subsequently re-enacted, on June 4, 1920. As the Army and Navy interpretations, concerning jurisdiction in a case like this, were the same, adoption by Congress of the Army's interpretation of the Army Articles should be regarded as an adoption of the Navy's like interpretation of the Navy Articles.[12a]

What I have said is not, I think, in conflict with *Helvering* v. *Reynolds*, 313 U. S. 428, 432. There the Court held that an administrative construction contained in "certain office decisions of the Treasury," of a portion of the Revenue Act, although followed by re-enactment of that part of the statute, did not preclude the Treasury from subse-
[fol. 271] quently promulgating Regulations inconsistent with those earlier interpretations. But that case, I think, is distinguishable in several respects: (1) The earlier Treas-

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[12] *Helvering* v. *Welshire Oil Co.*, 308 U. S. 90, 110.

[12a] Moreover, before the alleged change of the Navy's interpretation, 29 of the Navy Articles were amended at least once; these amendments were made in numerous statutes from 1874 to 1925; none of these amendments indicated any intention to reject the interpretation here in question.

ury interpretations, as above noted, consisted of mere "office decisions"; such interpretations "do not commit the Department to any interpretation"; see *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 466. (2) Those earlier interpretations were not changed by a mere subsequent interpretation but by a Regulation, specifically authorized by Congress which gave the Treasury "continuing rule-making power" (see 313 U. S. at 428). (3) In the *Reynolds* case, there was no question of jurisdiction of a criminal action involving a man's personal liberty.

Accordingly, I think we should apply the "familiar rule" stated in *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401-402, "that a construction made by a body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, *must be treated as read into the statute.*" [12b] The *New Haven* case was cited with approval by Holmes, *J.*, in *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, 479, where he said that, "when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed." [12c]

[fol. 272] I incline to agree that Congress constitutionally could have conferred jurisdiction here, whereas question has been raised as to the constitutionality of the exception clause of the Army Article 94 (which is the equivalent of the exception clause in Navy Article 14 Eleven).[13] But I cannot understand what my colleagues mean by saying that the question here is not one of statutory jurisdiction.

[12b] Emphasis added.

[12c] See also *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339; *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *United States* v. *Bailey*, 9 Pet. 238, 255-256.

[13] *United States ex rel. Flannery* v. *Commanding General*, 69 F. Supp. 661; The Amenability of the Veterans to Military Law, 46 Col. L. Rev. (1946) 947.

If the statute should be interpreted as the Judge Advocate Generals construed it for many decades, then it is just as if it provided that a court-martial cannot legally try a man in the circumstances which existed here; and such a provision patently restricts jurisdiction.

5. For the foregoing reasons, I think appellee could not be tried lawfully by a Navy court-martial, even if it be assumed that the Secretary, with the President's approval, intended otherwise by publishing §334 of Naval Courts and Boards, 1937. Moreover, I question whether such was the intent: Surely it is far from clear that those sentences in §334, to which my colleagues refer, were meant as an instruction rather than a mere digest of earlier naval court martial decisions which had not been previously approved by the Secretary.[14] In the light of the ambiguity of those sentences of §334, and because, at best, the statutory authority is highly doubtful, I think we should not impute to the President the intention ascribed to him by my colleagues. Particularly should we not do so, inasmuch as otherwise we would have the strange spectacle of the President, the head of both the Army and Navy, giving one instruction to the Army and a very different one to the Navy, as to a grave matter of common concern to both services. [fol. 273] If, nevertheless, it be true that the President and Secretary so intended, but if (as I think) they lacked authority to issue such an instruction, appellee's re-enlistment could not validly extend the power over the court-martial over him. Even a definite consent to trial for a specific offense by a court-martial must be disregarded where statutory power is absent.[15] And here, at most, we have a general consent given before any offense was charged. As already noted, this alleged consent amounted to waiver of the right to a jury trial in a criminal suit; such a right cannot be waived, even after commencement of suit, unless the defendant is keenly aware of what he is doing.[16] There was

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[14] See footnote 7, *supra*.

[15] *McClaughry* v. *Deming*, 186 U. S. 49, 66, 68; *cf. Ver Mehren* v. *Sirmyer*, 36 F. (2d) 876, 879-880 (C. C. A. 8); *Rosborough* v. *Rossell*, 150 F. (2d) 809, 816 (C. C. A. 1).

[16] See, *e. g.*, *Patton* v. *U. S.*, 281 U. S. 276, 312; *Johnson* v. *Zerbst*, 304 U. S. 458; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275, 278; *Von Moltke* v. *Gillies*, — U. S. — (March 8, 1948); *cf. Glasser* v. *U. S.*, 315 U. S. 60, 70.

nothing resembling such awareness here; for appellant's counsel on oral argument admitted that an enlisted man, until charged with an offense, does not ever see Naval Courts and Boards, 1937.[17]

[fols. 274-275] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of June, one thousand nine hundred and forty-eight.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES ex Rel. HAROLD E. HIRSHBERG, Relator-Appellee,

v.

CAPTAIN M. J. MALANAPHY, U. S. Navy, etc., Respondent-Appellant

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 276] Clerk's Certificate to foregoing transcript omitted in printing.

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[17] Moreover, I think we may take judicial notice of the following: (1) Naval Courts and Boards, 1937, is not distributed to enlisted men; (2) it is not issued to all officers; (3) although each ship or shore station should have at least one copy of it, an enlisted man in the ordinary course of events does not see the volume unless he is charged with an offense or makes a special request for it to one of the officers to which it is distributed. Appellant's counsel, indeed, admitted the truth of item (2).

[fol. 277] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1948.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9306)

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term—1948

No. 231

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Petitioner,

—v.—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN J. O'NEIL,
HAROLD ROSENWALD,
Attorneys for Petitioner.

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22 Op. Att'y Gen. 137 (1898) 22
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IN THE

Supreme Court of the United States

October Term—1948

No.

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Petitioner,

—v.—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Harold E. Hirshberg, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on April 9, 1948, reversing an order of the United States District Court for the Eastern District of New York sustaining a writ of habeas corpus (R. 27, 228).

Statement of the Matter Involved

Petitioner enlisted in the United States Navy for the remaining period of his minority on March 24, 1936 (R. 38). Upon reaching his majority, he extended his enlistment on November 8, 1939, for a period of two years (R. 39). On November 7, 1941, while he was stationed at Cavite in the Philippine Islands, petitioner's enlistment again expired and he was honorably discharged from the Naval service (R. 45). On the same day he reenlisted for a further period of four years (R. 46, 124). He was promoted from time to time and on February 23, 1942, attained his present rating of Chief Signalman (R. 124).

In May, 1942, upon the surrender of Corregidor, petitioner became a prisoner of war of the Japanese and remained such a prisoner until he was liberated in September, 1945 (R. 124). After extensive hospitalization he was restored to duty (R. 40). On March 26, 1946, petitioner received an honorable discharge by reason of the expiration of his enlistment (R. 126). This discharge became effective at midnight, March 26, 1946, and at that time petitioner became a civilian (R. 41, 145). During the afternoon of the following day, March 27, 1946, petitioner again enlisted in the Navy for a period of four years (R. 42, 110).

On February 24, 1947, petitioner was served with charges and specifications, dated February 12, 1947, directing his trial before a General Court Martial convened by the Commandant, Third Naval District (R. 63, 134). There were three charges: Maltreatment of a Person Subject to his Orders, with four specifications thereunder; Conduct to the Prejudice of Good Order and Discipline, with four specifications thereunder; and Assaulting Another Person

in the Navy, with one specification thereunder (R. 134-141). The offenses set forth in the specifications were alleged to have been committed during the period from November 10, 1942, to March 1, 1944, during petitioner's prior enlistment and while he was a prisoner of the Japanese (R. 134-141).

At the outset of the trial petitioner made a plea in bar of trial on the following grounds: (1) that the General Court Martial had no jurisdiction to try him for offenses allegedly committed while he was a prisoner of war; and (2) that the General Court Martial had no jurisdiction to try him for offenses allegedly committed during an enlistment which had expired and at the termination of which he had received an honorable discharge. This plea was denied (R. 103, 105). On August 12, 1947, after trial, petitioner was acquitted of two charges and seven specifications. He was convicted of the charge of Maltreatment of a Person Subject to his Orders, under Article 8 (Second) of the Articles for the Government of the Navy (herein called "AGN"), and of two specifications thereunder.[1] He was sentenced to imprisonment for ten months, reduction in rating to apprentice seaman, and a dishonorable discharge from the United States Navy (R. 101).

On August 18, 1947, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York (R. 7-12). The petition challenged the jurisdiction of the Naval Court Martial on two grounds: (1) that at the time of the alleged offenses petitioner was not subject to the AGN since he was a prisoner of war of the Japanese; and (2) that upon the

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1 Each specification of which petitioner was convicted set forth a simple assault, *i.e.* with closed fists, of a fellow prisoner subject to petitioner's orders.

expiration of petitioner's enlistment during which the alleged offenses occurred and his receipt of an honorable discharge, the jurisdiction of the Navy to try petitioner for any offenses during that enlistment (except offenses under Article 14, AGN) was terminated, and his subsequent reenlistment did not revive that jurisdiction (R. 7-12). After argument the District Court filed its opinion on September 26, 1947, overruling the first contention of petitioner but sustaining the second (R. 200-212). On September 29, 1947, petitioner was released from the custody of respondent (R. 27-29).

Respondent appealed to the Circuit Court of Appeals for the Second Circuit from the order of the District Court by Notice of Appeal dated December 23, 1947 (R. 3, 4). Petitioner moved to dismiss the appeal, under Rule 73 of the Federal Rules of Civil Procedure, on the ground that it had not been taken within sixty days of the order of the District Court (R. 220-221). This motion was denied by the Circuit Court of Appeals on January 12, 1948 (R. 222).

The cause was argued before the Circuit Court of Appeals on March 4, 1948 (R. 223). On April 9, 1948, the Circuit Court of Appeals reversed the order of the District Court with a written opinion (R. 223-228). Circuit Judge Frank filed a dissenting opinion (R. 227). A petition for rehearing was filed by petitioner on April 20, 1948 (R. 229-241). Respondent filed a memorandum in answer to this petition on May 7, 1948 (R. 242-253). The cause was again argued before the Circuit Court of Appeals on May 13, 1948. On June 2, 1948, the Circuit Court of Appeals adhered to its former judgment, in a written opinion, by a divided court (R. 254-256, 264). Circuit Judge Frank again filed a dissenting opinion and withdrew his former dissenting opinion for reasons stated below (R. 256-264).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. sec. 347).

Statutes and Other Material Involved

1. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 8 (Second).

> "**Article 8. Persons to whom applicable.** Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—
>
> * * * * *
>
> **Second (Cruelty).** Or [who] is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders; * * *"

2. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 14 (Eleventh).

> "**Eleventh (Trial of offender after discharge).** And if any person, being guilty of any of the offenses[2] described in this article, while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

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2 The offenses described in Article 14 are frauds against the United States and similar crimes. They do not include the alleged offenses of which petitioner was convicted (R. 225).

3. 34 U. S. C. §591.

"**Regulations of Navy; what constitute.** The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner."

4. Naval Courts and Boards (1937 ed.) §334.

"**Same: When jurisdiction over persons terminates.** The jurisdiction of courts martial over officers, midshipmen, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge. However, a discharge obtained by fraud does not oust the jurisdiction of a court martial. The mere expiration of the period of enlistment of an enlisted man, without the concurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offenses committed during the period of enlistment. Discharge by expiration of enlistment does not take effect, notwithstanding delivery of the discharge certificate, until midnight of the last day of service. Discharge at any other time or for any other cause takes effect on delivery of the certificate. An officer dropped from the rolls by order of the President for absence without leave for three months or more, in accordance with the act of April 2, 1918, cannot thereafter be tried by court martial, he having by this act become fully separated from the service and become a civilian.

The general rule is subject to the following exceptions:

(a) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the naval service of the United States; receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

* * * * *

5. Naval Courts and Boards (1923 ed.), §559, ft. nt. (30) [Change No. 7].

"Art. 14, A. G. N. (sec. 92).

Except for offenses provided for in that article, a court-martial may not try an individual who has been formally

separated from the Navy and is no longer in the service (31 Op. Atty. Gen. 521; *Ex parte Wilson,* 33 Fed. (2d) 214) unless proceedings were instituted against him while he was in the service (31 Op. Atty. Gen. 521; C. M. O. 26-1917). However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute (*Ex parte Joly,* 290 Fed. Rep. 858). Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Art. 14, A. G. N. (G. C. M. Rec. No. 75140, Feb. 1, 1933, and G. C. M. Rec. No. 76425, Apr. 4, 1934)."

Questions Presented

1. Whether petitioner's reenlistment in the Navy subjected him to the jurisdiction of the Navy to try him by court martial for an alleged offense committed during a prior enlistment, at the termination of which he had received a discharge, when, in the absence of such reenlistment, the Navy would admittedly not have had jurisdiction to try petitioner for such alleged offense (R. 41, 126, 224, 225).

2. Whether the Naval court martial had jurisdiction to try petitioner for an alleged offense committed during an enlistment which had expired, at the termination of which petitioner had received an honorable discharge (R. 100-109, 126, 134-141).

Reasons Relied On for Allowance of Writ

1. The Circuit Court of Appeals for the Second Circuit has decided a novel question of great importance in the administration of the AGN, in holding that reenlistment in the Navy revives the jurisdiction of the Navy to try an enlisted man for offenses committed during a prior enlistment. This question has not been, but should be, settled by this Court.

2. In its decision with respect to the effect of reenlistment, the Circuit Court of Appeals has adopted a strained construction of the AGN, which results in different rules for the Army and the Navy in the identical situation.

3. The holding of the Circuit Court of Appeals that petitioner consented to the jurisdiction of the Naval court martial by his contract of reenlistment is unrealistic and is inconsistent with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (CCA 8th, 1929).

4. In holding that the last two sentences of section 334(a), Naval Courts and Boards (1937 ed.) constituted a binding regulation concerning the effect of reenlistment, the Circuit Court of Appeals failed properly to interpret these two sentences as a mere reference to prior decisions.

5. In its decision with respect to the effect of reenlistment, the Circuit Court of Appeals has adopted a recent administrative interpretation of the AGN which has not been clearly established, and has rejected a prior long settled and contrary administrative interpretation.

6. The Circuit Court of Appeals has rendered a decision with respect to the legal effects of an honorable discharge from the Naval service which is of vital importance to the discipline and morale of Naval personnel, and which may affect the liberty and well-being of a great number of such personnel, and which should be settled by this Court.

7. The Circuit Court of Appeals has rendered a decision with respect to the legal effects of an honorable discharge which is inconsistent with the decisions of this Court and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Gould* v. *Drainer*, 158 F. 2d 981 (CCA 9th, 1947).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD E. HIRSHBERG,
Petitioner.

JOHN J. O'NEIL,
HAROLD ROSENWALD,
Attorneys for Petitioner.

IN THE

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Petitioner,

—v.—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court is reported in 73 F. Supp. 990 (1947) (R. 200-212). The opinions of the Circuit Court of Appeals for the Second Circuit are not yet reported (R. 223-227, 254-264).

Jurisdiction

The basis for this Court's jurisdiction is set forth in the petition, *supra*, page 5.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that petitioner's reenlistment in the Navy revived the Navy's

jurisdiction to try him for an alleged offense committed during a prior enlistment.

2. The Circuit Court of Appeals erred in holding that the last two sentences of Section 334(a), Naval Courts and Boards (1937 ed.) constituted "instructions" and, accordingly, "regulations" within the meaning of Section 591 of Title 34, USC.

3. The Circuit Court of Appeals erred in holding that petitioner agreed under his contract of enlistment to be bound by the provisions of the last two sentences of Section 334(a), Naval Courts and Boards (1937 ed.).

4. The Circuit Court of Appeals erred in accepting a recent administrative interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy revives the jurisdiction of the Navy over offenses committed during a prior enlistment.

5. The Circuit Court of Appeals erred in failing to accept a long settled interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy does not revive the jurisdiction of the Navy over offenses committed during a prior enlistment.

6. The Circuit Court of Appeals erred in holding that petitioner's honorable discharge from the Naval service at the expiration of his prior enlistment did not extinguish his responsibility before a Naval court martial for any offenses allegedly committed during that enlistment.

Summary of Argument

In holding that petitioner's reenlistment revived the Navy's jurisdiction to try him for an alleged offense committed during a prior enlistment, the Circuit Court of Appeals has decided a question of general importance in the administration of Naval justice. The decision of that question may affect thousands of persons who may reenlist or be drafted into the Navy. The law concerning this question and related questions is in a state of confusion and should be clarified by this Court.

The decision of the Circuit Court of Appeals results in different rules for the Army and the Navy in the situation of this case, although there is no statutory basis for such a difference. Equal justice and the morale of the services require uniform interpretations of doubtful questions affecting the jurisdiction of courts-martial of the Army and the Navy.

The Circuit Court of Appeals has erred in interpreting the statements in Section 334(a) of Naval Courts and Boards (1937 ed.) as "regulations" binding upon petitioner under Section 591 of Title 34, U. S. Code. Moreover, the holding that petitioner agreed to be bound by these so-called "regulations" by his contract of reenlistment is based on an unsound construction of that contract. Petitioner cannot agree to be bound by the contents of a manual for Naval courts-martial which could never come to his attention.

The current administrative interpretation of the AGN concerning the effect of reenlistment on the jurisdiction of the Navy over offenses during a prior enlistment should not have been accepted by the Circuit Court of Appeals. That interpretation has not been clearly established and

is not consistent with related administrative rulings of the Navy. Moreover, it purported to replace an established administrative interpretation of the Navy which had become a part of the AGN.

Finally, the Circuit Court of Appeals has failed to accord any effect to the honorable character of petitioner's discharge at the expiration of his enlistment. In this respect the decision of the Circuit Court of Appeals is inconsistent with decisions of this Court and of another Circuit Court of Appeals.

ARGUMENT

I

The Circuit Court of Appeals for the Second Circuit has decided a question of general importance relating to the effect of reenlistment on the jurisdiction of the Navy over offenses committed during a prior enlistment.

A. *Importance of Question.*

The effect of reenlistment on the power of the Navy to punish for offenses committed during a prior enlistment has never been considered by this Court nor, prior to this case, by any Federal court. The importance of this question cannot be overstated. Naval courts martial are courts of limited jurisdiction, defined by Congress in the AGN. *Rosborough* v. *Rossell*, 150 F. 2d 809 (CCA 1st, 1945). In an area where that jurisdiction is doubtful, the Courts have the great responsibility of determining the precise limits of the jurisdiction. In a democratic society the scope of the authority of military tribunals involves

fundamental civil liberties. The extension of that authority is *pari passu* an encroachment on the jurisdiction of civilian courts having all the safeguards of the common law.

Although this case presents a novel question for this Court, the situation is not new or unusual. The Judge Advocate General of the Navy has published at least five opinions on the effect of reenlistment on Naval jurisdiction over offenses during a prior enlistment. C. M. O. 22—1917, page 7; C. M. O. 12—1921, page 11; C. M. O. 1—1926, page 9; C. M. O. 12—1929, page 7; C. M. O. 7—1938, page 42. See also: Winthrop, Military Law and Precedents (1920 ed.), page 93; 31 Op. Att'y Gen. 521 (1919). Since opinions are published in only a small fraction of Naval court martial cases, it may be assumed that the question has arisen in many other cases.[3] At present this Nation maintains and undoubtedly will continue to maintain large Naval forces. For the future the decision of this question will be of the gravest importance to thousands of enlisted men in the Navy. This Court has recognized the importance of determining the limits of the jurisdiction of Naval courts martial by granting a writ of certiorari in a recent case involving the jurisdiction to try members of the Fleet Reserve for offenses committed while not on active duty. *United States ex rel. Pasela* v. *Fenno*, 167 F. (2d) 593 (C. C. A. 2d, 1948), *certiorari* granted, June 21, 1948.

B. *Confused State of the Law.*

The confusion which exists concerning the jurisdictional question is shown by the instant case. In the District

3 Several unpublished decisions are referred to in Naval Courts and Boards (1923 ed.), Section 559 (ft. nt. 30) (added after original publication), and in C. M. O. 7—1938, page 42.

Court the writ of habeas corpus was sustained. In its first opinion the Circuit Court of Appeals reversed the District Court in reliance on the provisions of 34 U. S. C., Section 591, and Section 334(a), Naval Courts and Boards (1937 ed.), relating to the effect of reenlistment. A dissenting opinion was written by one member of the court (R. 256). The Circuit Court of Appeals later granted a petition for rehearing and ordered a reargument of the cause. In the oral argument on rehearing counsel for respondent conceded that the original majority opinion was unsound insofar as it was based on 34 U. S. C., Section 591 (R. 256). Despite this virtual confession of error with respect to an important ground for its decision, the majority, in a new *per curiam* opinion, adhered to its original decision and reaffirmed the grounds therefor. The dissenting judge, because of respondent's concessions in the oral argument, withdrew his original opinion and filed a new dissenting opinion (R. 256).

The Navy's administrative rulings concerning the effect of reenlistment are not consistent. From 1862 until 1933, (a period of 61 years) the Navy had held that reenlistment did not revive the jurisdiction over offenses committed during a prior enlistment (R. 257). C. M. O. 22—1917, page 7; C. M. O. 12—1921, page 11; C. M. O. 1—1926, page 9; C. M. O. 12—1929, page 7; Laws Relating to the Navy, Ann. (1929 Supp.), page 179. In 1933[4] or thereabouts the Navy mistakenly adopted a "precisely opposite interpretation" (R. 255) with respect to the specific situation involved in this case. As we shall show, this interpretation appears to be in conflict with other rulings of the Navy and of the Federal courts. (*Infra*, pages 24, 25). The rule

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4 See page 24, *infra*.

of the Army, based on no statutory provision, is contrary to the Navy rule and to the decision of the court below. Manual for Courts-Martial U. S. Army (1928), Par. 10; Dig. Op. JAG (1867-1912), page 515, §VIII 1 lb; Dig. Op. JAG (1912-1940), §369(4).

II

The Circuit Court of Appeals has adopted a strained construction of the Articles for the Government of the Navy which results in different rules for the Army and the Navy in the identical situation.

A. *Lapse of Jurisdiction upon Discharge.*

Generally a discharge or dismissal of an officer or enlisted man from the Naval service terminates the jurisdiction of the Navy with respect to all offenses except those under Article 14, AGN. *United States* v. *Warden*, 265 Fed. 787 (E. D. N. Y., 1919); *United States* v. *MacDonald*, 265 Fed. 695 (E. D. N. Y., 1920); *Ex parte Wilson*, 33 F. 2d 214 (E. D. Va., 1929); *Ex parte Drainer*, 65 F. Supp. 410, 411 (N. D. Cal., 1946), aff'd *sub nomine Gould* v. *Drainer*, 158 F. 2d 981 (CCA 9th, 1947); 5 Op. Att'y Gen. 55, 58, 59 (1848); 8 Op. Att'y Gen. 328 (1857); 24 Op. Att'y Gen. 570 (1903); 31 Op. Att'y Gen. 521 (1919); C. M. O. 1—1921, page 15. The same general rule, with a similar exception, prevails in the Army. See *Hironimus* v. *Durant*, 168 F. 2d 288 (CCA 4th, 1948). The Circuit Court of Appeals concedes this principle but creates confusion by confining its statement of the principle to cases of honorable discharge (R. 225). The jurisdiction is lost, under the AGN, by reason of separation from the service, even without honor. *Ex parte Wilson*, *supra*. Winthrop, Mili-

tary Law and Precedents (1920 ed.), page 93. Under Article 14 (Eleventh) of the AGN, the jurisdiction is expressly retained, after discharge or dismissal, with respect to certain offenses chiefly involving frauds against the United States. It seems clear from this express retention of jurisdiction in Article 14 that Congress intended the jurisdiction to lapse at the expiration of an enlistment in cases not arising under Article 14, such as the present case. Since the AGN contain no provision for jurisdiction over reenlisted men with respect to offenses during a prior enlistment, it may similarly be argued that Congress intended to exclude such jurisdiction.

B. *Conflict Between Army and Navy Rules.*

The AGN are silent concerning the effect of reenlistment and rightly so for each enlistment is a separate and distinct contract. *In re Grimley*, 137 U. S. 147 (1880). Until 1933, as we have stated above, the rule had long been established in the Navy that reenlistment did not revive jurisdiction over offenses committed during a prior enlistment. The same rule has long prevailed and still prevails in the Army (See pages 16, 17, *supra*). In Section 559 (ft. nt. 30) (added after original publication) of the 1923 edition of Naval Courts and Boards and in Section 334(a) of the 1937 edition of Naval Courts and Boards a change in the rule was indicated. This change was caused[5] by a decision of a Federal district court, which held that an Army court martial could try a regular Army officer for an offense committed during his earlier service as a Reserve officer, even though there had been an interval of

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5 *Ex parte Joly* was cited in C. M. O. 7—1938, page 42 and in Naval Courts and Boards (1923 ed.) Section 559 (ft. nt. 30), both of which indicated the change in the Navy's rule.

several months between his two services. *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y., 1922). This decision was plainly erroneous on the theory of the Circuit Court of Appeals in this case, since the District Court in *Ex parte Joly* failed to accept the administrative interpretation of the Army which had been in effect for many years. See pages 16, 17, *supra*. But the Circuit Court of Appeals now feels constrained to give the effect of law to the new interpretation of the Navy based on a Federal district court decision which failed to give such effect to the established rule of the Army. It is a strange commentary on the judicial process that the administrative ruling of the Army remains unchanged, both by *Ex parte Joly*, *supra*, and the decision below.

C. *Policy in Favor of Uniform Army and Navy Rules.*

Counsel for respondent has conceded that in the Army reenlistment does not revive jurisdiction over offenses during a prior enlistment (R. 257); Manual for Courts-Martial U. S. Army (1928), page 8 §10. In its construction of the AGN the Circuit Court of Appeals has imputed to Congress an intention to adopt differing rules for the Army and the Navy. In its construction of Naval Courts and Boards that Court has imputed a similar intention to the President.

The recent merger of the armed forces indicates an intention to treat all the services alike. It is not conceivable that Congress would have intended, in the identical situation, to subject Naval personnel to trial by court martial and to let Army personnel go free. Strong reasons should exist for finding such a discrepancy. They are not stated in the majority opinions of the court below. Surely this

Court should say the last word where such a result is reached by a divided court on doubtful grounds.

D. *The Construction of the AGN by the Court Below is Erroneous.*

In construing the AGN, the court below has ignored the established principle that penal laws "should not receive a strained construction in order to sustain the jurisdiction of a special and limited tribunal such as a court martial". *Rosborough* v. *Rossell, supra,* 150 F. 2d at page 816. The construction adopted by the court below is strained beyond the breaking point. Conceding that the last two sentences of Section 334(a), Naval Courts and Boards, are "not in form an imperative declaration," the court held that they nevertheless constituted an "instruction" and therefore a "regulation".[6] Accordingly, said the court, they were binding on petitioner under Section 591, Title 34 U. S. C.[7] It is submitted that this reasoning is wholly unsound. Moreover, it ignores the axiom of military law that

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6 The majority opinion of the court below states that Section 334(a) must be an "instruction" "for otherwise it would be meaningless to include it in a volume issued for the government of all persons attached to the naval service' * * *." (R. 226). But there are numerous statements in Naval Courts and Boards which could not conceivably be "instructions" much less "regulations". Take, for example, the following statement from Section 333: "The status of civilians on duty with or attached to the Naval forces of the United States and entering the war zone on board American merchant vessels can only be determined by examination of the decisions of the Federal Courts of the United States, the purport of which decisions it would be difficult to state briefly, as the principles laid down therein were applied to varying facts. However the decisions of the Federal Courts seem clearly to support the general proposition that * * *."

7 See the dissenting opinion of Circuit Judge Frank: "The Navy (as distinguished from my colleagues) freely concedes that 34 U. S. C. A. Sec. 591 has nothing to do with the case" (R. 256).

an order or command must amount to "a positive mandate." Winthrop, Military Law and Precedents (1920 ed.), page 574. It is essential that the recipient of a military order or command may determine from its form whether obedience is required. We submit that the two sentences in question are not an "instruction", but, as the dissenting judge stated, "a mere digest of earlier naval court martial decisions * * *" (R. 263). Moreover an "instruction" is not a "regulation", because it is not in "mandatory form".[8] Winthrop, *op. cit. supra, ibid.*

III

The construction of petitioner's contract of reenlistment by the court below is unrealistic and is inconsistent with a decision of the Circuit Court of Appeals for the Eighth Circuit.

Having determined that the last two sentences of Section 334(a) Naval Courts and Boards (1937 ed.) constituted a "regulation", the majority of the court below then held that they were incorporated by reference in petitioner's contract of reenlistment as part of the "regulations" to which he agreed to be subject under that contract. The court pointed out that all persons in the Naval service "so far as the duties of each are concerned" are directed to observe the provisions of Naval Courts and Boards. See Naval Courts and Boards (1937 ed.), page vi.

Naval Courts and Boards is primarily a manual for the use of Naval courts-martial, courts of inquiry, and boards of investigation. It has never been circulated gen-

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8. For purposes of Section 591 of Title 34, U. S. C., the court below did not have to conclude that an "instruction" is a "regulation" since that Section covers both.

erally in the Naval service. Only a small percentage of Naval officers have duties which require a familiarity with its provisions. Only enlisted men in the yeoman branch attached to courts martial or legal staffs would even see this book. Surely a chief signalman, such as petitioner, would neither see Naval Courts and Boards nor understand its contents if he should see it. To call the provisions of this book a part of the contract of enlistment is to indulge in a fiction without any foundation. This is incorporation by reference beyond the limits of any reason or fairness.

Moreover, the holding of the court below that petitioner consented to the jurisdiction of the Naval court martial is inconsistent with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Ver Mehren* v. *Sirmyer,* 36 F. (2d) 876 (CCA 8th, 1929). In that case it was held that one cannot confer jurisdiction upon a military court by consent. *Cf*: 22 Op. Att'y. Gen. 137 (1898).

IV

The Circuit Court of Appeals has accepted a recent administrative interpretation of the Articles for the Government of the Navy which has not been clearly established and has rejected a long settled and contrary interpretation.

A. *Importance of Question.*

One of the most important questions in this case is the effect to be given to the Navy's administrative interpretations of the AGN. The Circuit Court of Appeals rested its decision on an acceptance of those interpretations. It is a matter of foremost importance for this Court to decide whether the jurisdictional boundaries of military courts

may be extended by administrative interpretations. In the light of our policy "adverse to any unnecessary extension of the authority of military courts" (R. 260), it would seem that administrative decisions on a question of jurisdiction should always be subject to judicial review. In *Rosborough* v. *Rossell*, 150 F. (2d) 809 (CCA 1st, 1945), the Circuit Court of Appeals for the First Circuit rejected certain decisions of the Navy on a question of jurisdiction under the AGN, and determined the matter for itself. But the court below has relied on the Navy's latest interpretation of the statute, and has added little independent reasoning in support of its decision.

B. *The Present Administrative Interpretation of the AGN Has Not Been Clearly Established.*

The present administrative interpretations of the Navy with respect to the effect of reenlistment have been "too desultory and brief to fix the meaning" of the AGN. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 311 (1933). The origins of the present rule are found in a case which arose in the Navy in 1919. C. M. O. 237—1919, page 22. In that case the Navy requested of Attorney General Palmer his opinion concerning its jurisdiction to try a man, who had reenlisted in the Navy, for an offense committed during a prior enlistment. The Attorney General, relying in part on the Army rulings referred to above, held that there was no jurisdiction. However, he suggested that the Navy "assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question." 31 Op. Att'y Gen. 521 (1919).

Thereafter, the Navy continued for more than a decade to adhere to its established ruling that reenlistment does not restore the jurisdiction over offenses committed during

a prior enlistment. Laws Relating to the Navy, Ann. (1929 Supp.) page 179 (reporting a case decided in January, 1922); C. M. O. 12—1929, page 7. *Ex parte Joly, supra,* was decided in 1922, but it was not until 1933 that the Navy accepted it as the "authoritative judicial determination" referred to by Attorney-General Palmer. See ft. nt. 30 to Section 559, Naval Courts and Boards (1923 ed.), which added after publication a reference to a 1933 case[9] changing the rule.

The present administrative ruling concerning the effect of reenlistment is difficult to reconcile with related rulings of the Navy. Where a man deserts during an enlistment in the Navy and thereafter reenlists in the Navy and receives a discharge, the Navy has ruled that he cannot be tried for desertion committed during the prior enlistment.[10] C. M. O. 3—1946, page 79; C. M. O. 7—1946, page 247; C. M. O. 2—1947, page 36. To the same effect see: *Gould v. Drainer, supra.* Since expiration of an enlistment is not effective until there is a discharge (Naval Courts and Boards (1937 ed.), Section 334; *Ex parte Wilson, supra*), it would seem that such a deserter would remain in the Navy and amenable to court martial under the terms of his first enlistment. He would continue to be a "person in the naval service" (34 U. S. C. Sec. 1200, Article 8) to the same extent as petitioner, and his discharge from the

9 G. C. M. Rec. No. 75740 dated February 1, 1933.

10 The Army rule again differs from the Navy rule and from the decision in *Gould v. Drainer, supra.* In the Army an honorable discharge terminates the particular term of enlistment to which it relates and does not relieve a soldier from the consequences of a desertion committed during a prior enlistment. However, a dishonorable discharge does not relate to any particular enlistment and does relieve the soldier from such consequences. Dig. Op. JAG (1867-1912) page 515, par. VIII, 1 1c.

Naval service under the second enlistment would not terminate the Navy's jurisdiction over him under the decision of the court below. Accordingly, the administrative rulings on these related cases are inconsistent, just as the decision of the Circuit Court of Appeals in the case at bar is inconsistent with *Gould* v. *Drainer*, *supra*.

In view of its evolution and apparent conflict with related rulings, the present administrative Naval ruling is neither clearly established nor consistent. Therefore, it should not be given the same weight as is normally accorded to unambiguous rulings of "those who must constantly deal with the statute and whose understanding of it is likely to be right in cases of doubt" (R. 255). This Court should now make the "authoritative judicial determination" that Attorney General Palmer deemed appropriate.

C. *The Navy was Bound by its Settled Administrative Interpretation.*

For many years prior to 1933 the Navy had consistently ruled that reenlistment did not revive its jurisdiction over offenses in a prior enlistment. Thereafter, as we have shown, the Navy has held that reenlistment does revive its jurisdiction.

In these circumstances the earlier interpretations of the AGN were written into the statute and could not be changed by subsequent administrative interpretations. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294 (1933); *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 (1941). Despite the able and vigorous opinion of the dissenting judge, the Circuit Court of Appeals completely disregarded the decisions of this Court and acquiesced in the new interpretation adopted by the Navy. The court below glossed over the problem with the statement

that "the Navy has had two interpretations and their later one seem to us permissible and preferable" (R. 256). But the second interpretation was made in the face of a long standing administration of the law under the first interpretation and was thus invalid. The rule of the *Bunte* case should be followed, as the dissenting judge pointed out (R. 260), where personal liberty is at stake and the jurisdiction of a military tribunal is in question. Otherwise there is grave danger that the arbitrary action of administrative officials may become an instrument of oppression.

V

The decision of the Circuit Court of Appeals concerning the effect of an honorable discharge is inconsistent with decisions of this Court and of another Circuit Court of Appeals and should be reviewed by this Court.

As we have stated above, the question whether petitioner's reenlistment revived the Navy's jurisdiction is not affected by the kind of discharge which petitioner received at the end of his prior enlistment. But petitioner received an honorable discharge. The court below stated that an honorable discharge does not operate as a "pardon" (R. 255). No question of a "pardon" is involved since petitioner had not been convicted of any offense at the time of his discharge. But a discharge with honor has been held by this Court to constitute "a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor." *United States* v. *Kelly*, 82 U. S. 34 (1872).

The decision of the court below concerning the effect of an honorable discharge is inconsistent with *Ex parte*

Drainer, supra. In the *Drainer* case it was held that an honorable discharge at the termination of a second enlistment in the Navy gave immunity from prosecution for desertion during a prior enlistment. The District Court based its decision on the ground that the honorable discharge from the second enlistment constituted a final accounting with respect to the military service that had terminated. In affirming without an opinion the Circuit Court of Appeals for the Ninth Circuit rendered a decision which, on this point, is inconsistent with the decision of the court below.

To millions of veterans the effect of an honorable discharge is a question of the gravest importance. Under the decision of the court below these veterans might well be subject to trial for offenses committed during the war if they should reenlist or be drafted into the service again.[11] They might not even be protected by the Statute of Limitations. For under the court's reasoning they might be regarded as being not amenable to Naval justice between their periods of service and the Statute of Limitations might therefore be tolled.[12] Before such a rule becomes the

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11 Under the Selective Service Act of 1948 persons who have served honorably on active duty for at least 12 months between September 16, 1940, and June 24, 1948, or more than 90 days between December 7, 1941, and September 2, 1945, may not be inducted under the Act; others who have not so served may be inducted. Public Law 759—80th Congress, ch. 625—2d Session.

12 The second majority opinion, adopting the suggestion of respondent's counsel, found this case analogous to "that of a defendant who commits a crime in Canada, escapes to the United States, and then returns to Canada" and is, of course, subject to prosecution. Such a person is a fugitive from justice and might well be subject to extradition from the United States. Although this analogy seems clearly inapplicable, if it were applied to this case the Statute of Limitations would be tolled during the period that petitioner was a civilian. See: *In re Davidson*, 4 Fed. 507 (S. D. N. Y., 1880); *Ex parte Clark*, 274 Fed. 533 (S. D. N. Y. 1921).

law of this country the voice of this Honorable Court should be heard.

CONCLUSION

The Circuit Court of Appeals for the Second Circuit has decided a question relating to the jurisdiction of Naval courts martial which has not been, but should be, settled by this Court. In an area of law where certainty is of the greatest importance, the administrative rulings of the Navy and the Army and decisions of the lower Federal courts are in a state of confusion. This confusion has been aggravated by the decision of the Circuit Court of Appeals. Wherefore, petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review its judgment in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 231

231

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Petitioner,

—v—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM—1948

No. 231

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—v—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (R. 200-212) is reported at 73 F. Supp. 990. The opinions of the Circuit Court of Appeals (R. 223-227, 254-264) are reported at 168 F. (2d) 503.

Jurisdiction

The judgment of the Circuit Court of Appeals (R. 228) was entered on April 9, 1948. A petition for rehearing was filed by petitioner on April 20, 1948 (R. 229-241), and after

oral argument, the Circuit Court of Appeals adhered to its previous decision in an opinion rendered on June 2, 1948 (R. 254-256, 264). The petition for writ of certiorari was filed on August 17, 1948 and certiorari was granted on October 18, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Statutes and Other Material Involved

The Statutes and other material involved are set forth in the Appendix, pp. 33-36 *infra*.

Questions Presented

1. Whether petitioner's reenlistment in the Navy subjected him to the jurisdiction of the Navy to try him by Court Martial for an offense allegedly committed during a prior enlistment, at the termination of which he had received a discharge, when; in the absence of such reenlistment, the Navy would admittedly not have had jurisdiction to try petitioner for such alleged offense (R. 41, 126, 224, 225).

2. Whether the Naval Court Martial had jurisdiction to try petitioner for an offense allegedly committed during an enlistment which had expired, at the termination of which petitioner had received an honorable discharge. (R. 100-109, 126, 134-141).

Statement

Petitioner enlisted in the U. S. Navy under a minority enlistment on March 24, 1936 (R. 38). On reaching his majority on November 8, 1939, he extended his term of

enlistment for a period of two years (R. 39). On November 7, 1941, while stationed in the Philippine Islands, his enlistment expired and he was honorably discharged (R. 45). He reenlisted the same day for a period of four years (R. 46, 124). Through good conduct and proficiency in his duties, he attained promotions to higher rates, and on February 23, 1942, he secured his present rating of Chief Signalman (R. 124).

In May, 1942, after actively participating in the defense of Corregidor, petitioner was taken a prisoner of war of the Japanese and remained such till he was liberated in September, 1945 (R. 124). After extensive hospitalization, he was given a physical examination prior to discharge and on March 26, 1946, his enlistment having expired, he was given an honorable discharge (R. 41, 145). In the afternoon of March 27, 1946, petitioner reenlisted in the Navy for a period of four years (R. 42, 110).

On February 24, 1947, eleven months after reenlistment and 18 months after liberation as a prisoner of war, petitioner was served with charges and specifications, directing his trial before a General Court Martial, convened by the Commandant of the Third Naval District (R. 63, 134). The offenses as set forth were alleged to have been committed while the petitioner was a prisoner of war of the Japanese during his prior enlistment (R. 134-141).

During the trial before the Court Martial, petitioner made a plea in bar of trial on the grounds: (1) that the general court had no jurisdiction to try him for offenses allegedly committed while he was a prisoner of war, and, (2) that the general court martial had no jurisdiction over offenses allegedly committed during an enlistment which had expired and from which he had received an honorable discharge. This plea was denied (R. 103-105). On August 12, 1947, after trial, petitioner was acquitted of two charges

and seven specifications, but was convicted of the charge of maltreatment of a person subject to his orders, under Article 8 (second) of the Articles for the Government of the Navy (hereinafter referred to as "AGN") and of two specifications thereunder.[1] He was sentenced to ten months, reduced to apprentice seaman and given a dishonorable discharge from the U. S. Navy (R. 101).

On August 18, 1947, petitioner filed a petition for a writ of habeas corpus in the United States District Court of the Eastern District of New York (R. 7-12). The petitioner challenged the jurisdiction of the General Court Martial on two grounds: (1) that at the time of the alleged offenses, petitioner was not subject to AGN since he was a prisoner of war of the Japanese; and (2) that the alleged offenses had occurred during an enlistment from which the petitioner had received his honorable discharge and since the offenses did not come under Article 14, AGN, the jurisdiction of the General Court Martial never existed and could, therefore, not be revived by a subsequent reenlistment (R. 7-12). After argument, the District Court filed its opinion on September 26, 1947, over-ruling the first contention of the petitioner but sustaining the second (R. 200-212). On September 29, 1947, the petitioner was released from custody of the respondent (R. 27-29), and since that time has been on active duty with the U. S. Navy.

Respondent appealed to the Circuit Court of Appeals for the Second Circuit from the order of the District Court, by notice of appeal dated December 23, 1947 (R. 3, 4). Petitioner moved to dismiss the appeal under Rule 73 of the Rules of Civil Procedure, on the grounds that it had

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1. Each specification of which petitioner was convicted set forth separate assaults, *i.e.*, with closed fists on a fellow prisoner, subject to petitioner's orders.

not been taken within sixty days of the order of the District Court (R. 220, 221). This motion was denied by the Circuit Court of Appeals on January 12, 1948 (R. 222).

The cause was argued before the Circuit Court of Appeals on March 4, 1948 (R. 223). On April 9, 1948, the Circuit Court of Appeals reversed the order of the District Court with a written opinion (R. 223-228), and Circuit Judge Frank filed a dissenting opinion (R. 227). Petitioner filed a petition for a rehearing on April 20, 1948 (R. 229-241) and on May 7, 1948, respondent filed a memorandum in answer to this petition (R. 242-253).

The cause was again argued before the Court on May 13, 1948, and on June 2, 1948, said court adhered to its former judgment in a per curiam opinion and once again Circuit Judge Frank wrote a dissenting opinion after withdrawing his former dissent (R. 254-256-264). Thereafter, a writ of certiorari was submitted to this Honorable Court and on October 18, 1948, said writ of certiorari was granted.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that petitioner's reenlistment in the Navy revived the Navy's jurisdiction to try him for an offense allegedly committed during a prior enlistment.

2. The Circuit Court of Appeals erred in holding that the last two sentences of Section 334 (a), Naval Courts and Boards (1937 ed) constituted "instructions" and, accordingly, "regulations" within the meaning of Section 591 of Title 34 U. S. C. A.

3. The Court below erred in holding that petitioner agreed, under his contract of enlistment, to be bound by

the provisions of the last two sentences of Section 334 (a) of Naval Courts and Boards (1937 ed).

4. The Circuit Court of Appeals erred in accepting a recent administrative interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy revives the jurisdiction of the Navy over offenses committed in a prior enlistment.

5. The Circuit Court of Appeals erred in failing to accept a long settled interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy does not revive the jurisdiction of the Navy over offenses committed during a prior enlistment.

6. The Circuit Court of Appeals erred in holding that petitioner's honorable discharge from the Naval service at the expiration of his prior enlistment, did not extinguish his responsibility before Naval Court Martial for any offenses allegedly committed during that enlistment.

Summary of Argument

The Navy derives its court martial jurisdiction solely from the Articles for the Government of the Navy (herein called the "AGN"). Court martials, therefore, are courts of limited jurisdiction, the scope of their authority being explicitly regulated and limited by statute. Especially where, as here, the statutory tribunal exercises penal jurisdiction, the statute granting this jurisdiction must be strictly construed.

Neither Article 8, nor any other provision of the AGN, can be construed to extend court martial jurisdiction over Naval personnel for offenses committed in a previous en-

listment from which they have been discharged. While Article 8 provides for jurisdiction over "any person in the Navy", this plainly does not empower the Navy to try such persons for offenses *whenever committed*. Article 14 provides that in certain kinds of offenses (not involved here) the Navy shall retain jurisdiction even after discharge, thereby implying that this is not the case in other offenses.

Furthermore, the interpretation that such jurisdiction exists is inconsistent with the lack of jurisdiction over enlisted personnel in similar situations. Since the Army has interpreted the Articles of War as not granting jurisdiction over enlisted personnel for offenses committed in an earlier enlistment, a different rule would apply depending upon the branch of service which a person might join or into which he might be drafted. Further, the arbitrary result would obtain that while a person who remained a civilian or joined the Army after discharge from the Navy or a person who joined the Navy after discharge from the Army would not be subject to court martial for an offense committed in the earlier enlistment, this would not be so of a person who happened to serve and then reenlist in the Navy.

The assertion of such jurisdiction by the Navy, in decisions in several court martial cases and a reference to such decisions in Naval Courts and Boards, is not a determination which is in any sense binding upon this Court. The Navy is nowhere authorized to make determinations of the scope of its jurisdiction and it is familiar doctrine that the interpretation of statutory jurisdiction is a judicial and not an administrative function.

Further, insofar as the practical interpretation of a statute by the department charged with its enforcement has weight in determining the final judicial interpretation, the long standing interpretation by the Navy that jurisdic

tion did not exist in these cases argues for a similar judicial determination. These interpretations are not simply deductions from the failure to assert jurisdiction, but were in the form of positive declarations that no jurisdiction existed. Moreover, the failure of Congress to amend the AGN in the face of this long-standing interpretation and the action of Congress in reenacting without change the Articles of War, under which the same interpretation prevailed suggests Congressional approval of this interpretation.

The recent attempt by the Navy to repudiate these past interpretations by asserting jurisdiction over enlisted personnel for offenses committed in prior enlistments should not be viewed as at all persuasive. First, the change was inspired by the District Court opinion in *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.) This decision failed to give effect to the administrative rulings of the Army and was never accepted by the Army as compelling a change in the interpretation of its jurisdiction in situations like that here presented. Secondly, a departmental agency, no less than a court, is required to give great weight to a long line of consistent interpretations. An about face in interpretation after many years must surely rest on well-nigh irresistible grounds, let alone the insubstantial groundwork of this one suspect opinion, to warrant its judicial affirmation.

Reliance upon Section 334 (a) of Naval Courts and Boards as a regulation with the force of law to which the petitioner consented to be bound upon his enlistment is wholly unwarranted. The relevant provisions of Section 334 (a) are in no sense a "regulation" in the sense of an order or command. It is rather a summary of recent court-martial orders and the decision in *Ex parte Joly, supra.* It is, therefore, not a "regulation" to which petitioner con-

sented to be bound. Furthermore, insofar as that Section purports to extend court-martial jurisdiction beyond what is granted in the statute, it is invalid and, therefore, not binding upon petitioner whether or not he consented. It is fundamental that jurisdiction over the subject matter cannot be conferred by consent. Moreover, petitioner never did in fact consent to be bound by this Section which he had no occasion even to read; consent can be adduced only by a fiction.

Finally, the honorable discharge from the Navy received by petitioner upon the termination of his first enlistment constituted a final accounting with respect to the military service that had been terminated. *Ex parte Drainer*, 65 F. Supp. 410 (N. D. Cal.), aff'd sub nomine *Gould* v. *Drainer*, 158 F. (2d) 981 (C. C. A. 9); *United States* v. *Kelly*, 82 U. S. 34.

ARGUMENT

I

The Articles for the Government of the Navy should be construed by their terms to deny jurisdiction over petitioner to the naval court martial.

Strong considerations of public policy require a strict interpretation of the jurisdiction of naval courts martial under the AGN. Such courts have limited jurisdiction which is defined by Congress in the AGN. *Rosborough* v. *Rossell*, 150 F. (2d) 809 (C. C. A. 1). In a democratic society the scope of the authority of military tribunals involves fundamental civil liberties. The extension of that authority is *pari passu* an encroachment on the jurisdiction of civilian courts having all the safeguards of the common law. Since Article 8 of the AGN is a criminal statute, it

should be strictly construed on that ground. See *Rosborough* v. *Rossell, supra*, 150 F. (2d) at page 816.

The AGN do not confer upon the Navy any express power to try by court martial a person who has reenlisted in the Navy for an alleged offense committed during a prior enlistment. It is true that Article 8 of the AGN, under which petitioner was convicted, by its terms provides for jurisdiction over "any person in the Navy." But this broad provision is subject to limitations. For example, Article 8 surely does not apply to an offense committed by the accused while a civilian prior to his entry into the Naval service.[2] In the same way, Article 8 does not apply to an offense committed during a prior enlistment which has been terminated by an honorable discharge. Except for offenses under Article 14 of the AGN, there should be a concurrence of two factors to make an enlisted man subject to court martial under the AGN: (1) he must be in the Navy when the proceedings against him are commenced; and (2) the offense must have been committed during the enlistment current at the time of trial.

"Enlistment is a voluntary contract for military service for a certain term entered into by a civil person with the United States." Winthrop, Military Law and Precedents (1920) ed., page 538; *In re Grimley*, 137 U. S. 147; 6 Ops. Att'y. Gen. 190. One of the most important elements of the contract is the period of the enlistment, which is fixed by Congress. Winthrop, *op. cit. supra*, page 546, ft. nt. 75. At the present time "enlistments in the Navy may be for minority or terms of two, three, four, or six years . . . ". 34 U. S. C. 181. These short terms indicate an intention of Congress that the termination of an enlistment shall

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2. The contrary intimation in *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y., 1922), has never been accepted by the Navy or the Army.

mark the end of a chapter and that no incidents of the enlistment shall survive.

For many years the AGN have been construed to provide that a discharge or dismissal of an officer or enlisted man from the Naval Service terminates the jurisdiction of the Navy with respect to all offenses except those under Article 14, AGN. *United States* v. *MacDonald*, 265 Fed. 695 (E. D. N. Y.); *Ex parte Wilson*, 33 F. (2d) 214, (E. D. Va.); *Ex parte Drainer*, 65 F. Supp. 410, 411, (N. D. Cal.), aff'd *sub nomine Gould* v. *Drainer*, 158 F. (2d) 981 (C. C. A. 9th); 5 Ops. Att'y. Gen. 55, 58, 59; 8 Ops. Att'y. Gen. 328; 31 Ops. Att'y. Gen. 521; C. M. O. 1—1921, page 15. The same general rule, with a similar exception, prevails in the Army. See *Hironimus* v. *Durant*, 168 F. (2d) 288 (C. C. A. 4th). In Winthrop's Military Law and Precedents (1920 ed.) at page 93, the rule governing amenability to court martial jurisdiction after expiration of enlistment and discharge, when the proceedings have not commenced prior thereto, is stated:

> "Putting out of question the class of offenses, the amenability for which is expressly defined by the 60th Article, it is the opinion of the author that, *in separating, in any legal form, from the service an officer or soldier* or consenting to his separation therefrom *and remanding him to the civil status at which the military* jurisdiction properly terminated, the United States (while it may of course continue to hold him liable for a pecuniary deficit,) *must be deemed in law to waive the right to prosecute him before a court martial for an offense previously committed, but not brought to trial.* In this view, a subsequent reappointment or reenlistment into the army would not revive the jurisdiction for past offenses, but the same would

properly be considered as finally lapsed." (Italics ours)

The same rule appears at page 115 of volume I of Winthrop's work, 1886 edition and at page 124 of his volume of 1896. Laws Relating to the Navy, two volumes, the 1922 volume at page 870-874 and the 1929 supplement at page 179, is in accord.[3]

In the exceptional cases, where Congress has intended the jurisdiction to survive discharge from the service a specific provision has been made. Thus in Article 14 of the AGN, relating to frauds against the United States and similar offenses, the jurisdiction is expressly retained after the offender "receives his discharge, or is dismissed from the service." 34 U. S. C. §1200, Article 14 (Eleventh). Moreover, where the Secretary of the Navy extends the term of an enlistment in time of war or national emergency, the "laws and regulations for the government of the Navy" are made expressly applicable during such extension. 34 U. S. C. §181. Had Congress intended to confer jurisdiction over reenlisted men with respect to offenses during a prior enlistment, an express provision would have been made in the AGN.

Jurisdiction over reenlisted men with respect to offenses in a prior enlistment would involve a discrepancy in their treatment as compared with persons in similar situations. In the Army the rule has long prevailed, based on no express provision in the Articles of War, that reenlistment does not revive jurisdiction over offenses in a prior enlist-

3. The Circuit Court of Appeals concedes the general principle, but creates confusion by confining its statement of the principle, to cases of honorable discharge (R. 225). The jurisdiction is lost, under the AGN, by reason of separation from the service, even without honor. *Ex parte Wilson, supra*; Winthrop, *Op. Cit. supra*; p. 93.

ment. Manual for Courts-Martial U. S. Army (1928), page 8, §10; Dig. Op. JAG (1867-1912), page 515, §VIII 1 1b; Dig. Op. JAG (1912-1940), §369 (4). The construction of the AGN adopted by the Circuit Court of Appeals would result in differing rules for the Army and the Navy.

Neither those who served in the Army or the Navy and remain in civilian status after their discharge, nor those who enlist in the Army after having served in the Navy, nor those who enlist in the Navy after having served in the Army, may be tried by court martial for alleged offenses committed during their original period of service at any time following their discharge, (except for offenses under Article 14, AGN or the corresponding provision of the Articles of War). Under the decision of the Circuit Court of Appeals an exception is made in the case of those who serve in the Navy and reenlist in that branch of the service. In the absence of unequivocal language in the statute, it cannot be assumed that Congress intended such discrimination.

The Circuit Court of Appeals erred in accepting the analogy suggested by the respondent, namely, "that of a defendant who commits a crime in Canada, escapes to the United States, and then returns to Canada; he cannot defend on the ground that between the offense and the trial he was beyond the jurisdiction of the Canadian court." (R. 255). This example is anything but analogous for that person was a fugitive from justice and could have been extradited from the United States, whereas petitioner was never a fugitive from the Navy (he was honorably discharged), and if he had not reenlisted of his own volition, the Navy could not have recalled him to service, nor "extradite" him. He had completed his contract of enlistment.

If the analogy of the Circuit Court of Appeals were accepted, it would follow that persons who serve in the Navy and return to civilian life might well be subject to trial by court martial for offenses committed during such service if at any subsequent time they return to Naval jurisdiction. For under the analogy the statute of limitations would be tolled during the time that such persons were civilians and would commence to run again only upon their return to Naval jurisdictions. See: *In re Davidson* 4 Fed. 507 (S. D. N. Y.); *Ex parte Clark*, 271 Fed. 533 (S. D. N. Y.) Surely the AGN should not be construed to permit such a result.

II

Even if the provisions of the AGN were ambiguous the determination of the jurisdictional question by the Navy is not binding, since the Navy cannot finally determine its own jurisdiction.

We have already shown that the AGN should be construed, without reference to extraneous aids to its construction, to deny jurisdiction over reenlisted personnel with respect to offenses committed during a prior enlistment. The Circuit Court of Appeals rested its decision, however, on the Navy's recent administrative interpretations, which purport to uphold the jurisdiction (R. 255, 256). See GCM Rec. No. 75740 (Feb. 1, 1933) cited in Naval Courts and Boards (1923 ed.), §559, ft. nt. 4[4]; C. M. O. 7—1938, p. 42. See Naval Courts and Boards (1937 ed.) §334.

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4. This footnote was added after the original publication, presumably after February 1, 1933.

Naval courts martial, however, are tribunals of limited jurisdiction, deriving their powers exclusively from statutory grants of power. As courts of limited jurisdiction their authority is narrowly confined within the scope of the jurisdiction so conferred. See *Rosborough* v. *Rossell*, 150 F. (2d) 809, 816 (C. C. A. 1). The Navy is not vested by the AGN with any broad rule-making power to assert jurisdiction not explicitly conferred by that Statute. True it is that Section 591 of Title 34, U. S. Code, permits the Navy, with Presidential approval, to issue "orders, regulations and instructions." But as stated by the dissenting Judge below, neither this section nor any other statutory provision creates a power to enlarge the jurisdiction of a court martial. So much was conceded by respondent on oral argument in the Circuit Court of Appeals, and is, in fact, required by those authorities which hold that regulations under Section 591 of 34 U. S. Code must be consistent with the statutes relating to the Navy. See *United States* v. *Symonds*, 120 U. S. 46, 49; *Glavey* v. *United States*, 182 U. S. 585, 605-606. In the *Symonds* case this Court stated (120 U. S. at page 49): "The authority of the Secretary to issue orders, regulations and instructions with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress with reference to the Navy."

As stated in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369:

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

Much less can an executive department extend its statutory jurisdiction by regulation.

In the light of our policy "adverse to any unnecessary extension of the authority of military courts" (R. 260), the limits of the jurisdiction conferred by the AGN should be finally determined by the courts. In fixing those limits in the present case this Court should make the final determination without being bound by the recently changed administrative rulings of the Navy.

III

To the extent that administrative interpretations are considered in construing the AGN, the long established rulings denying the jurisdiction herein asserted should be accepted and the later contrary rulings should be rejected.

A. History of Naval Administrative Rulings.

For many years prior to 1933 the Navy had consistently interpreted the AGN as denying jurisdiction to try reenlisted Naval personnel for offenses committed in a prior enlistment terminated by discharge, except for offenses under Article 14, AGN (R. 249, 257). C. M. O. 22—1917, p. 7; C. M. O. 12—1921, p. 11; C. M. O. 1—1926, p. 9; C. M. O. 12—1929, p. 7; Laws Relating to the Navy, Ann. (1929 Supp.), p. 179. The rule of the Army, predicated on similar statutory provisions, has been for many years, and now is, to the same effect. Dig. Op. JAG (1867-1912), page 515, §VIII I, 1b; Manual for Courts-Martial U. S. Army

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5. We are unable to find any rulings prior to those cited. The AGN were first enacted in 1799. 1 Stat. 712 (1799). No amendment governing the present question has been adopted.

(1928), Par. 10; Dig. Op. JAG (1912-1940), §369 (4); Winthrop, Military Law and Precedents (1920 ed.) p. 93.

These interpretations by the Navy were set forth in authoritative decisions in court martial cases in which the highest law officers of the Navy, the Judge Advocates General, after consideration of the scope of the Navy's court martial jurisdiction, expressly held that there was an absence of jurisdiction over reenlisted personnel with respect to offenses in a prior enlistment. Typical of the positive affirmations that there was no power to act in such cases is the holding in C. M. O. 12—1929, p. 7:

> "Except in cases of offenses in violation of article 14 of the Articles for the Government of the Navy, *there is no authority of law giving jurisdiction* to a Court Martial to try an enlisted man for an offense committed in a prior enlistment from which he had an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such re-enlistment at the time the jurisdiction of the Court was asserted." (Emphasis supplied)

In 1933 or thereabouts the Navy adopted a "precisely opposite interpretation" (R. 255). The origins of the present rule are found in a case which arose in the Navy in 1919. C. M. O. 237—1919, p. 22. In that case the Navy requested of Attorney General Palmer his opinion concerning its jurisdiction to try a man, who has reenlisted in the Navy, for an offense committed during a prior enlistment. The Attorney General, relying in part on the Army rulings referred to above, held that there was no jurisdiction. However, he suggested that the Navy "assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question." 31 Op. Att'y. Gen. 521.

Thereafter, the Navy continued to adhere to its established ruling that reenlistment does not restore the jurisdiction over offenses committed during a prior enlistment. Laws Relating to the Navy, Ann. (1929 Supp.) p. 179 (reporting a case decided in January, 1922). In 1922 a Federal district court held that an Army court martial had jurisdiction to try a regular Army officer for two alleged offenses committed during his earlier service as a Reserve officer, even on the assumption that there had been an interval of several months between his two services. *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.). One of the offenses was embezzlement, and under the 94th Article of War as under Article 14 of the AGN, jurisdiction over that offense would clearly have survived the discharge from the first service. The other offense, based on the same acts, was Conduct Unbecoming an Officer and a Gentleman. With respect to that offense the Court rested its decision on the wholly untenable ground that it did not matter when the offense occurred, even if the accused were a civilian at the time, since the Army should have the power to dismiss undesirable officers from the service. Apart from its unsound reasoning, the decision on this phase of the *Joly* case was plainly erroneous on the theory of the Circuit Court of Appeals in the present case, since the District Judge failed to accept the administrative rulings of the Army which had been in effect for many years. See page 16, *supra*.

The *Joly* case did not alter the Army rule that reenlistment does not revive jurisdiction over offenses during a prior enlistment. See Manual for Courts-Martial U. S. Army (1928), page 8, §10. However, in 1933 the Navy apparently accepted this decision as the "authoritative judicial determination" referred to by Attorney General Palmer and adopted its present administrative interpretation on the basis of that decision. Section 559, Naval Courts and

Boards (1923 ed.) ft. nt. 30.[6] (See Appendix, p. 35.) The new ruling was followed in C. M. O. 7—1938, p. 42 and presumably in other unreported decisions.

Section 334(a) of Naval Courts and Boards (1937 ed.) merely incorporates in the text of that edition the substantial provisions of footnote 30 of Section 559 of the 1923 edition. (See Appendix, p. 34.)

B. The Long Established Rulings of the Navy Should Be Accepted.

If the administrative rulings of the Navy are used to aid in the construction of the AGN on the theory that the terms of the statute are uncertain, then the long established rulings prior to 1933 should be held to fix the meaning of the statute.

This Court should apply the well-established rule that the long continued practical interpretation of an uncertain statute by the executive department charged with its administration should be given determinative significance in a judicial interpretation of the statute except where clearly erroneous. *United States* v. *Midwest Oil Co.*, 236 U. S. 459; *National Lead Co.* v. *United States*, 252 U. S. 140, 145-146; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Associations*, 310 U. S. 534; *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572.

In *Norwegian Nitrogen Products Co.* v. *United States*, *supra*, the case most often cited for this doctrine, this Court, speaking through Mr. Justice Cardozo, in upholding the power of the Executive to alter tariff schedules

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6. As we have stated, *supra* at page 14, ft. nt. 4, this footnote was added to the 1923 edition of Naval Courts and Boards by a "change" or amendment to the original publication, which was dated subsequently to February 1, 1933. The footnote cited *Ex parte Jolly*, *supra* and an unpublished decision of the Judge Advocate General, adopting the present administrative ruling, G. C. M. No. 75740, dated February 1, 1933.

under the Flexible Tariff Act without granting a hearing to those affected, said at p. 315:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U. S. 760, 763; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machinery Co.* v. *United States*, 282 U. S. 375; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178."

C. The Established Rulings Should Be Followed Since They Were Affirmative Determinations That Jurisdiction Did Not Exist.

Any attempt to distinguish the above decisions on the grounds that the administrative interpretation here involved is of a negative character in the sense that it relates to the absence of authority to act is foreclosed by the recent case of *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. In that case this Court, following the long standing interpretation of the Federal Trade Commission, rather than its new interpretation designed to extend its jurisdiction, held that the Federal Trade Commission Act did not give that Commission authority to proscribe unfair methods of competition in intra-state sales. This Court stated at pages 351, 352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not de-

pendent on control over infra-state transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315."

The authority of the *Bunte* case has been consistently recognized. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, 578 n. 17; *United States* v. *American Union Transportation Co.*, 327 U. S. 437. In *United States* v. *American Union Transportation Co.*, *supra*, this Court repudiated the long standing practice of the United States Maritime Commission not to assume authority over certain classes of forwarders in foreign commerce and sustained its attempt to assert jurisdiction in this case. But in that case there was a mere administrative failure to assert jurisdiction rather than, as here, an affirmative decision that jurisdiction was not granted. See 327 U. S. at page 455 n. 18. Further, the Court there considered the language, legislative history and policy of the statute as clear indications that the Commission was intended to have the power now asserted. In the language of the Court, at page 455 n. 18:

"The present case, by virtue of differences from that of Bunte Bros. relating to the clarity and definiteness of the statute's terms, the policy of the Act, and the legislative history, is one which falls within the pronouncement: 'Authority actually granted by Congress

of course cannnot evaporate through lack of administrative exercise.' 312 U. S. at 352."

Those cases which are sometimes cited for the proposition that instances of mere non-action are not as a rule given weight as contemporaneous departmental constructions are not controlling in this case. See *Union Stock Yard & Transport Co.* v. *United States*, 308 U. S. 213, 224; *Kansas City Southern* v. *United States*, 252 U. S. 147. In addition to the broad language of the *Bunte* case, *supra*, the nature of construction placed upon the AGN by the Navy fully distinguishes this case from those where mere non-action was involved. Here there is substantially more than the failure to exercise authority. Rather, as was shown above, the Navy Court Martial Orders here involved were positive declarations that the AGN did not confer jurisdiction over Naval personnel in respect of offenses committed in a previous enlistment. The administrative interpretations relied upon by petitioner took the form of considered decisions not to act because of an absence of authority rather than a mere failure to act.

D. The Long Established Rulings Have Been Sanctioned by Congress.

Further factors likewise compel the conclusion that the long established original administrative rulings of the Navy should be followed. During the years in which the Navy interpreted the AGN as not extending the court-martial jurisdiction to offenses committed during prior enlistments, the Congress made no move to change this interpretation by legislative enactment. This must be taken as legislative acquiescence in this interpretation. It is no novel principle that the silence of Congress in the face of

a long-continued departmental practice or statutory construction may be tantamount to legislative consent to such practice or interpretation. *The Pocket Veto Case*, 279 U. S. 655; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

Congress has not hesitated to annul Naval regulations of which it did not approve. For example, the Executive Order of November 12, 1908, limiting the duty of the Marine Corps to shore stations was annulled by the Act of March 3, 1909, 35 Stat. 773. See 27 Ops. Att'y. Gen. 259.

Indeed, there is more here than legislative silence. As has been shown, the Army has for many years consistently interpreted the substantially similar Articles of War as not granting court-martial jurisdiction over offenses like those here involved. *Supra*, page 16. In 1920 Congress reenacted the Articles of War without including any provision designed to alter this interpretation which existed at that time. Since the Army and Navy interpretations were identical and the statutes on which these interpretations were based were substantially similar in this regard, Congressional reenactment of the Articles of War without change may be taken as an approval of the Navy as well as the Army interpretation. As was stated in *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401, 402:

> "We make this concession because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particular construed, when not plainly erroneous, must be treated as read into the statute."

E. The Recent Administrative Rulings of the Navy Should Be Rejected.

The recent administrative rulings of the Navy, which reversed the long established rulings denying the jurisdiction asserted in this case, should not be accepted as guides to the interpretation of the AGN.

As we have shown, the prior consistent and eminently reasonable interpretation of the AGN by the Navy has the effect of requiring that the greatest weight be given to these interpretations by a court in making a judicial determination. It would follow that the Navy, which formulated and consistently followed that interpretation, was no less bound to respect it than a court of law. Surely it would demand the most substantial grounds and compelling arguments to warrant the judicial affirmation of such a change by the Navy. Such grounds are not here presented.

Least of all does the decision in *Ex parte Joly, supra*, which inspired this change, offer the substantial support required for its justification.

Despite the fact that the District Court in the *Joly* case ignored the long continued administrative rulings of the Army (see *supra* at page 18), and despite the fact that the Army refused to alter its interpretation of the Articles of War after this holding, the Navy accepted this decision as authority for its change in interpretation in situations like the present case. The dubious authority of the *Joly* case makes suspect the changed interpretation which rests upon it. Since the Navy relied upon the *Joly* case its recent rulings cannot be accepted as "evidence of those who must constantly deal with the statute, and whose understanding of it is likely to be right in cases of doubt" (R. 255).

A similar situation confronted this Court in *Kessler* v. *Strecker*, 307 U. S. 22, where the issue was presented

whether the statute providing for deportation of undesirable aliens permitted the deportation of an alien who once had been, but no longer was, a member of the Communist Party. The Justice Department had interpreted the statute as denying this power until certain decisions held to the contrary. Following these decisions the Justice Department reversed itself and attempted to deport such aliens. This Court upheld the earlier interpretation of the statute and pointed out that the later interpretation had apparently been influenced by erroneous judicial decisions. Said the Court at page 33:

> "The only decisions which support the Government's position are those in the Second Circuit. [U. S. ex rel Yokinen v. Comm'r of Immigration (CCA 2d) 57 F. 2d 707; U. S. ex rel Mannisto v. Reimer (CCA 2d) 77 F. 2d 1021.] We cannot approve their reasoning or result. We cannot find that there has been such uniform construction as requires an interpretation of the Act in accordance with that view. The administrative construction seems to have been in favor of the respondent's view until after the decision in the Yokinen case, and the construction seems to have been changed in deference to the decision in that case."

Likewise, in *Social Security Board* v. *Nierotko*, 327 U. S. 358, the Court declined to accept an administrative interpretation because it was based upon certain judicial decisions which the Court considered without merit.

IV

The jurisdiction of the Naval court martial cannot be based upon Section 334(a) of Naval Courts and Boards.

In its first opinion in this case the Circuit Court of Appeals referred to the rule stated in Winthrop's treatise and in the earlier court martial orders denying jurisdiction in cases like the present, and said:

> "These rulings would be conclusive against the jurisdiction of the court-martial in the case at bar, were it not for section 334, Naval Courts and Boards, 1937." (R. 225).

The theory of the Court was that under Section 591 of Title 34 U. S. Code, the Navy is authorized to issue "orders, regulations, and instructions"; that Section 334(a) of Naval Courts and Boards (1937 ed.) is an "instruction" and therefore a "regulation" under Section 591 of Title 34; that petitioner agreed to be bound by all "regulations" of the Navy under his contract of reenlistment; and that petitioner became subject to this "regulation" either by the terms of his enlistment contract or by the act of reenlistment.

We have already shown, *supra*, at pages 14-16, that the Navy has no power to extend its court martial jurisdiction either by regulations under Section 591 of Title 34, U. S. Code, or otherwise. It remains to be demonstrated that the provisions of Section 334(a), Naval Courts and Boards (1937 ed.) do not constitute a "regulation"; that petitioner did not consent to be bound by such provisions in his contract of reenlistment; and that, in any event, petitioner's consent could not confer upon the Naval court martial jurisdiction over the subject matter.

A. The Provisions of Section 334(a) of Naval Courts and Boards Do Not Constitute a Regulation.

Section 591 of Title 34, U. S. Code provides that:

> "The orders, regulations, and instructions issued by the Secretary of the Navy * * * with the approval of the President, shall be recognized as the regulations of the Navy * * * *"

The relevant provisions of Section 334(a) of Naval Courts and Boards (1937 ed.) can in no proper sense be considered a "regulation" of the Navy within the meaning of Section 591 of Title 34. The important sentence of Section 334(a) reads as follows:

> "However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A.G.N."

The very language of these sentences negates its classification as an "instruction" in the sense of a "regulation" or "order". To issue "orders, regulations, and instructions" clearly suggests the laying down of a mandatory pattern of conduct to be followed. These sentences purport to do nothing of the sort. Rather, they are, on their face, a sum-

mary of the one judicial decision on the point, *Ex parte Joly, supra*, and several Navy court martial orders which followed that decision. Especially is it true in a military organization that an order or command must amount to a "positive mandate" to have effect as such. See *Winthrop, Military Law and Precedents* (1920 ed.) p. 574. Certainly when a military organization, which historically is governed internally by directive mandates, elects to use the mild language of a text book summarizing cases, we cannot assume that an "instruction" in the sense of a "regulation" was intended.

The Circuit Court of Appeals concluded that since this language is part of a chapter entitled "Instructions for Courts Martial", it must be an "instruction" in the sense of a mandatory direction (R. 226). The section next preceding Section 334 provides:

> "The status of civilians on duty with or attached to the naval forces of the United States and entering the war zone on board American merchant vessels can only be determined by examination of the decisions of the Federal Courts of the United States, the purport of which decisions it would be difficult to state briefly, as the principles laid down therein were applied to varying facts."

Clearly this provision cannot be regarded as an instruction in the sense of an order or regulation. Nor can the narrative statement in Section 334(a) be so regarded.

B. Petitioner Did Not Consent to Be Bound by Section 334(a) of Naval Courts and Boards and in Any Event Jurisdiction Over the Subject Matter Cannot Be Conferred by Consent.

Having determined that the last sentence of Section 334(a) Naval Courts and Boards (1937 ed.) constituted a "regulation", the majority of the Court below then held that this provision was incorporated by reference in petitioner's contract of reenlistment as part of the "regulations" to which he agreed to be subject (R. 227). The Court pointed out that all persons in the Naval service "so far as the duties of each are concerned" are directed to observe the provisions of Naval Courts and Boards (R. 226). See Naval Courts and Boards, p. vi.

Naval Courts and Boards is primarily a manual for the use of Naval courts martial, courts of inquiry, and boards of investigation. It has never been circulated generally in the Naval service. Only a small perrentage of Naval officers have duties which require a familiarity with its provisions. Only enlisted men in the yeoman branch attached to courts martial or legal staffs would even see this book. Surely a chief signalman, such as petitioner, would neither see Naval Courts and Boards nor understand its contents if he should see it. To call the provisions of this book a part of the contract of enlistment is to indulge in a fiction without any foundation. This is incorporation by reference beyond the limits of any reason or fairness.

Furthermore, even if it could be concluded that petitioner consented to be bound by the provisions of Section 334(a), such consent could not confer upon the Naval court martial jurisdiction over the subject matter where that jurisdiction was not otherwise present. Such jurisdiction cannot be rested upon consent. *See Hormel et al. v. Northern Securities*, 194 U. S. 48; *Grubb v. Public Utilities Commis-*

sion, 281 U. S. 470; *VerMehren* v. *Sirmyer*, 36 F. (2d) 876 (C. C. A. 8). *Cf*: 22 Op. Att'y. Gen. 137. As this Court stated in the *Grubb* case, *supra*, 281 U. S. at page 475:

> "That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. Of course, he is entitled to raise this question notwithstanding his prior inconsistent attitude, for jurisdiction over the subject matter must arise by law and not by mere consent."

Finally, the jurisdiction of Naval courts-martial with respect to enlisted personnel should not depend upon the terms of the contract of enlistment. That jurisdiction should be determined by the status of such personnel as members of the Naval service. See *In re Grimley*, 137 U. S. 147, 152.

Those who are drafted into the service do not consent to be bound by the regulations of the Navy in any voluntary sense. Yet they should be, and undoubtedly are, bound by such regulations to the same extent as those who enlist. Moreover, merchant seamen are subject to the Articles of War by the mere fact of service on an Army transport. *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E. D. Va.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio).

V

Petitioner's honorable discharge at the expiration of his prior enlistment extinguished his liability to Naval courts martial for offenses allegedly committed during that enlistment.

The lower court stated that the honorable discharge of the petitioner did not operate as a "pardon". We have never held it out as such for, prior to his discharge he had not been convicted of any offense. In fact, he had not been accused, arrested nor served with charges. An honorable discharge has been determined by this court to be "a formal, final judgment, passed by the Government upon the entire military record of a soldier, and an authoritative declaration by it, that he had left the service in a state of honor." *United States* v. *Kelly*, 82 U. S. 34; *Ex parte Drainer, supra; In re Fong Chew Chung*, 149 F. (2d) 904; *United States* v. *Landers*, 92 U. S. 77.

Section 334 of Naval Courts and Boards, 1937 ed., states that mere expiration of enlistment does not relieve an enlisted man from his naval obligations. The essential factor that does give relief is the honorable discharge which is, in effect, a judgment. It was not secured through fraud or mistake and is, therefore, unimpeachable.

Presently, there are millions of men who have been discharged from the Navy. The time may not be too far distant when many of these man will be drafted or will reenlist. The AGN has a statute of limitation of two years (34 U. S. C. §1200, Art. 61).

If the decision of the Circuit Court of Appeals is held to be the law, any of these man who are drafted or who reenlist may be tried by a court martial for any offense they may have committed in their prior enlistment although, presently, they cannot be. The statute of limitations would

not be a valid plea in bar, for it could be stated in opposing said plea that the statute was tolled during the man's civilian status and did not begin to run until he returned to the service. Surely no such result was ever contemplated and an honorable discharge was meant to be, just as this Court has stated, "a formal final judgment".

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be reversed.

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Of Counsel.

APPENDIX

The pertinent provisions of the Articles for the Government of the Navy, other statutes and other material are as follows:

1. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 8 (Second).

> "**Article 8. Persons to whom applicable.** Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—
>
> * * * * *
>
> **Second (Cruelty).** Or [who] is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders; * * * "

2. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 14 (Eleventh).

> "**Eleventh (Trial of offender after discharge).** And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

---

1. The offenses described in Article 14 are frauds against the United States and similar crimes. They do not include the alleged offenses of which petitioner was convicted (R. 225).

3. 34 U. S. C. §591.

"**Regulations of Navy; what constitute.** The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner."

4. Naval Courts and Boards (1937 ed.) §334.

"**Same: When jurisdiction over persons terminates.** The jurisdiction of courts-martial over officers, midshipmen, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge. However, a discharge obtained by fraud does not oust the jurisdiction of a court martial. The mere expiration of the period of enlistment of an enlisted man, without the concurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offenses committed during the period of enlistment. Discharge by expiration of enlistment does not take effect, notwithstanding delivery of the discharge certificate, until midnight of the last day of service. Discharge at any other time or for any other cause takes effect on delivery of the certificate. An officer dropped from the rolls by order of the President for absence without leave for three months or more, in accordance with the act of April 2, 1918, can not thereafter be tried by court martial, he having by this act become fully separated from the service and become a civilian.

The general rule is subject to the following exceptions:

(a) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the naval service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

* * * * *

5. Naval Courts and Boards (1923 ed.) 559, ft.-nt. (30) [Change No. 7].

"Art. 14, A. G. N. (sec. 92).

Except for offenses provided for in that article, a court martial may not try an individual who has been formally

separated from the Navy and is no longer in the service (31 Op. Atty. Gen. 521; *Ex parte Wilson*, 33 Fed. (2d) 214) unless proceedings were instituted against him while he was in the service (31 Op. Atty. Gen. 521; C. M. O. 26-1917). However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute (*Ex parte Joly*, 290 Fed. Rep. 858). Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Art. 14, A. G. N. (G. C. M. Rec. No. 75740, Feb. 1, 1933, and G. C. M. Rec. No. 76425, Apr. 4, 1934)."

6. 34 U. S. C. §181.

"**§181. Length of term; discharge of minors; extension of term during war or emergency and discharge thereafter.**

Hereafter enlistments in the Navy may be for minority or terms of two, three, four, or six years, and all laws now applicable to four-year enlistments shall apply * * * to enlistments for a shorter or longer period * * *

* * * * *

Provided further, that all men whose terms of enlistment are extended in accordance with the provisions of sections 181, 181a, 201a, 692, 692a of this title, section 35a of Title 14, and section 16a of Title 37 shall continue during such extensions to be subject in all respects to the laws and regulations for the government of the Navy * * *."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 231

UNITED STATES OF AMERICA EX REL. HAROLD E. HIRSHBERG, *Petitioner*

v.

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 200-212) is reported at 73 F. Supp. 990. The opinions in the Court of Appeals (R. 223-227, 254-264) are reported at 168 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals (R. 228) was entered on April 9, 1948. A petition for rehearing was denied on June 2, 1948 (R. 264). The petition for a writ of certiorari was filed on August 17, 1948. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended [now 28 U. S. C. 1254].

QUESTION PRESENTED

Whether a legally constituted general court-martial of the Navy has jurisdiction to try a chief petty officer in the Navy for an offiense committed in a prior enlistment, within the applicable period of limitations, where that enlistment was terminated by an honorable discharge and was followed by a reenlistment on the day after discharge.

STATUTES AND EXECUTIVE REGULATIONS INVOLVED

The statutes and executive regulations involved are set forth in the Appendix, pp. 27-31, *infra*.

STATEMENT

The facts are neither complex nor in dispute. As shown in petitioner's continuous service record (Rel. Ex. 3, R. 117-127), he has been in the United States Navy since March 24, 1936. On that day he enlisted for the period of his minority; his date of birth having been May 18, 1918 (R. 117, 110). On November 8, 1939, being then at Canton, China, on board the U. S. S. *Mindanao*, he extended

his enlistment for two years (R. 121). When the enlistment expired, on November 7, 1941, he was stationed at Cavite, in the Philippine Islands. He was then honorably discharged, and, on the same day, he reenlisted for four years (R. 123, 125). He was regularly promoted during his service, and on February 23, 1942, attained his present rating of Chief Signalman (R. 125). This made him a Chief Petty Officer in the Navy (34 U. S. C. 176, *infra*, p. 27; Bureau of Naval Personnel Manual, p. 82A; Art. D-5102).

When the United States forces on Corregidor surrendered, in May 1942, petitioner became a prisoner of war of the Japanese, and remained such a prisoner for over three years, until he was liberated in September 1945. Thereafter he passed through various naval hospitals, and on March 26, 1946, while on duty with the Permanent Shore Patrol, Third Naval District, Brooklyn, he received an honorable discharge by reason of the termination of his enlistment, effective on midnight of that day. (R. 125, 127.)

This honorable discharge (Resp. Ex. A, R. 145) was issued by the Executive Officer of the Permanent Short Patrol, by direction. Such discharges are not issued by the Bureau of Naval Personnel of the Navy Department, but are issued by the commanding officer of the man concerned, pursuant to Bureau of Naval Personnel Manual, part D, chapter 9 (Rel. Ex. 5, R. 128).

Petitioner reenlisted in the Navy for four years on the afternoon of the next day, March 27, 1946 (R. 51; Rel. Ex. 2, R. 110). This reenlistment did not require reference to the Bureau of Naval Personnel before being effected, and secured to petitioner all the benefits of continuous service in respect of pay and allowances, longevity increases, and time for transfer to the Fleet Reserve and for retirement (Rel. Ex. 5, R. 128, 129).

Thereafter, on February 24, 1947, petitioner was served with charges dated February 12, 1947, directing his trial before a general court-martial convened by the Commandant, Third Naval District (R. 63; Rel. Ex. 7, R. 134-141). Nine specifications were charged, all setting out offenses alleged to have been committed while petitioner was a Japanese prisoner of war, between November 10, 1942, and March 1, 1944. Petitioner was tried by general court-martial between July 21 and August 12, 1947 (R. 100), and on the latter day was acquitted of seven specifications and convicted of two, namely, maltreating a person subject to his orders, to wit, two other naval enlisted men who were Japanese prisoners of war and members of the work section in his charge (R. 100-101, 134-135, 136).

Petitioner was sentenced to 10 months' confinement, to reduction to the grade of apprentice seaman, and to a dishonorable discharge from the Navy (R. 101). The convening authority reviewed

the case, and, relying on Section 334 of *Naval Courts and Boards, 1937*, approved the proceedings, findings, and sentence (Rel. Ex. 1, R. 100-109).

Meanwhile, on August 18, 1947, the present proceeding was initiated by the filing of a petition for a writ of habeas corpus (R. 7-21), which alleged that the court-martial was without jurisdiction, first, because petitioner was a prisoner of war of the Japanese at the time the offenses alleged were committed and thus was not amenable to United States naval jurisdiction; and second, that because the alleged offenses were committed in an enlistment which had been terminated by an honorable discharge, petitioner was thus relieved of all liability for any acts done in that enlistment, and naval jurisdiction was not revived by his reenlistment the day following the honorable discharge.

The writ issued (R. 5); petitioner was produced in court (R. 1, 33); and, after argument, the district court filed an opinion rejecting petitioner's first contention but sustaining his second (R. 200-212). Petitioner was accordingly ordered released (R. 27). Appeal was timely taken (R. 3), and a motion to dismiss the appeal was denied (R. 219-222).

On appeal, the court below reversed, one judge dissenting, holding that petitioner's reenlistment subsequent to the promulgation of Section 334, *Naval Courts and Boards, 1937*, disposed of any jurisdictional objections (R. 223-227). On re-

hearing, the court below adhered to its original views, in an opinion which pointed out that the court-martial had jurisdiction of petitioner's person and of his offense, and that the Navy's view that the honorable discharge was not the equivalent of a pardon was "permissible and preferable" (R. 254-256). The dissenting judge likewise adhered to his conclusions, but in a new opinion (R. 256-264).

ARGUMENT

Petitioner is an individual who has made the naval service his career; who except for an interval of a fraction of a day has been in the Navy for twelve and a half years, since March 1936; who was charged with an offense committed while he was serving in the Navy; who was tried by naval court-martial while he was serving in the Navy; who was not amenable to any civil tribunal for his offenses; and who could not have been tried for those offenses by any federal court or jury. Consequently there is no foundation in fact or in law for his suggestion that the decision below involves "an encroachment on the jurisdicton of civilian courts having all the safeguards of the common law" (Pet. 15). Moreover, petitioner's persistent urging that his case is one of general importance (Pet. 9, 10, 13, 14, 15, 20, 22, 27, 28) is completely undermined by his admission (Pet. 14) that the question now raised "has never been considered by this Court nor, prior to this case, by any Federal court."

A. *No civilian court could have tried petitioner for his offenses, but the naval court-martial had full jurisdiction to do so.*—The offenses of which petitioner was convicted were committed in 1943 in the Commonwealth of the Philippines while he was a member of the United States Navy held as a prisoner of war in the Japanese custody during the Japanese occupation of the Philippine Islands. Under accepted standards of international law, he was not in those circumstances amenable to Philippine jurisdiction either during the war or after the termination of hostilities. *Coleman* v. *Tennessee,* 97 U. S. 509; *Dow* v. *Johnson,* 100 U. S. 158. In any event, trial by a Philippine tribunal would not have carried with it any "right" to trial by jury. *Dorr* v. *United States,* 195 U. S. 138; Bill of Rights, Art. III, Constitution of the Philippines (1935), 30 Phil. Laws 371, 371-373.

Moreover, petitioner could not have been tried by any federal district court under the "first brought" clause of old Sec. 41, Judicial Code (28 U. S. C. [1946 ed.] 102), now 18 U. S. C. 3238, for the reason that the substantive provisions which in 1943 and earlier covered offenses within the exclusive jurisdiction of the United States (Criminal Code, Secs. 272-289; 18 U. S. C. [1946 ed.] 451-468) did not extend to the Philippines. Sec. 1 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 692; see 25 Op. Att'y Gen. 25; Sec. 5 of the Act of Aug. 29,

1916, c. 416, 39 Stat. 545, 547 (48 U. S. C. [1934 ed.] 1003.)[1] Consequently, offenses committed on land in the Philippine Islands prior to independence were not offenses against the United States. Cf. 28 Op. Att'y Gen. 24 (offense committed on board United States ship in Philippine waters). It follows that the dissenting judge below was wholly in error in supposing that the present case involved "waiver of the right to a jury trial in a criminal suit" (R. 263).

This petitioner was accordingly either subject to trial by naval court-martial, or else not subject to trial at all. The court below held, necessarily we submit, that he was subject to trial by naval court-martial. That follows because all of the jurisdictional prerequisites to the validity of such a trial—a legally constituted court, with jurisidiction over person and offense, and empowered to impose the sentence adjudged—were present here.[2]

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[1] The 1902 Act made inapplicable to the Philippines R. S. 1891, which had made the Constitution and laws of the United States applicable to all the territories; and the 1916 Act provided that subsequently enacted laws of the United States should not apply to the Philippines unless therein specifically so provided.

[2] (a) The general court-martial that tried petitioner was lawfully constituted. It was convened by the Commandant, Third Naval District (R. 137), who, pursuant to AGN 38 (Second), *infra*, p. 29, was empowered to convene such a tribunal.

(b) The general court-martial had jurisdiction of petitioner's person; he had reenlisted in the Navy on March 27, 1946, for a period of four years, at which time he bound him-

There is no contention that any of these jurisdictional requirements were lacking, and under the rule many times laid down by this Court, the jurisdiction of the court-martial which tried petitioner is therefore unassailable. *Carter* v. *Roberts*, 177 U. S. 496, 498; *Carter* v. *McClaughry*, 183 U. S. 365, 380-381, 401; *Mullan* v. *United States*, 212 U. S. 516, 520; *In re Yamashita*, 327 U. S. 1, 8-9.[3] Petitioner's contention therefore comes to this, that the honorable discharge which he received is the equiv-

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self to "be subject to such laws, regulations, and articles for the government of the Navy as are or shall be established by the Congress of the United States or other competent authority" (Rel. Ex. 2, R. 110, 114). He was thus at the time of trial subject to naval jurisdiction. See AGN 8, *infra*, p. 28, under which he was convicted, which extends to "any person in the Navy"; see also, *e. g.*, *Ex parte Milligan*, 4 Wall. 2, 123, 137.

(c) The general court-martial had jurisdiction of petitioner's offense; AGN 8 (Second) expressly provides for punishment of any person in the Navy who "is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders."

(d) The sentence imposed was within the limits permitted by law; AGN 8 authorizes, upon conviction, "such punishment as a court-martial may adjudge."

[3] Petitioner has at no time contended that he was denied any procedural safeguards or deprived of any incident of due process of his trial by court-martial. Consequently the present record does not raise any question whether the now expanded scope of habeas corpus on review of judgments of conviction in civil courts (*Johnson* v. *Zerbst*, 304 U. S. 458; *Waley* v. *Johnston*, 316 U. S. 101; *Van Moltke* v. *Gillies*, 332 U. S. 708; cf. *Sunal* v. *Large*, 332 U. S. 174) may similarly have broadened the reach of habeas corpus on review of judgments of conviction in military courts (cf. *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664, 666 (C. C. A. 3)).

alent of a blanket pardon for any undetected crime theretofore committed in the navy service, depriving the court-martial of power to hear his case—even though by reenlistment he had meanwhile resubjected himself to naval jurisdiction.

B. *A person who continues in or resumes naval status remains subject to naval jurisdiction regardless of changes within his naval status.*—As we have already pointed out, the petitioner in this case is a professional sailor; the Navy is his career; and his case therefore can not pose any question as to where the line between civil and military jurisdiction is to be drawn.

It does not involve trial of civilians or of camp-followers by military tribunals, nor any question as to when an individual ceases to be a civilian through entrance into the service or resumes civilian status by leaving the service, nor the statutory extension of court-martial jurisdiction over civilians who were formerly in the service, in respect of frauds committed against the Government in their military or naval status, by virtue of AGN 14 (Eleventh), *infra*, pp. 28-29, or of AW 94 (10 U. S. C. 1566). Petitioner here was not a civilian; he was in the Navy when the offenses charged against him were committed, and when he was tried; and he does not now question his naval status at either of these periods.[4]

[4] Petitioner has abandoned his contention that, because he was a prisoner of war, he could not be subject to naval jurisdiction for anything done while in that status.

The present case involves, therefore, not a civilian, but an individual who has made the Navy his career, who reenlisted on the day following his discharge, and who received all the benefits of continuous service. The narrow question presented is whether the honorable discharge which he received should be given the threefold effect of (a) a pardon for offenses committed in the earlier enlistment but not known to the naval authorities at the time of discharge, (b) a shorter statute of limitations for offenses not barred by limitations at the time of discharge (see AGN 61, *infra*, p. 30), and (c) an estoppel against the United States, although the discharge was issued at Brooklyn in 1946 and the offenses were committed in the Japanese-occupied Philippines in 1943.

Yet, curiously enough, the earlier administrative Army rulings gave to an honorable discharge precisely that threefold effect, but without reliance on any statutory provision. Dig. Op. JAG (1912), p. 515, pars. VIII, I, 1b and 1c; Dig. Op. JAG (1912-1940), par. 369(4), sub-pars. 1, 3; *Manual for Courts-Martial* (1928), par. 10; I Winthrop, *Military Law & Precedents* (2d ed. 1896) *124. However, under the influence of *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.), the later Army rulings adopt the view that a change within an individual's military status is immaterial so long as his service is continuous or substantially so. See last sub-par. of par. 10, *Manual for Courts-Martial*.

In the *Joly* case, an officer committed an offense while holding an emergency commission; he was discharged from that commission to accept a Regular commission; there was no interval between his services under the respective commissions; and it was held that court-martial jurisdiction to try him for an offense (under AW 95 (10 U. S. C. 1567), which contains no saving clause) committed prior to the discharge was not terminated by the discharge. Numerous rulings have applied this principle in a variety of instances, and the Army rule now seems to be that while jurisdiction continues where two commissions are separated by an honorable discharge and two enlistments by a discharge for the convenience of the Government, it lapses when an honorable discharge intervenes between two enlistments.[5]

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[5] Thus it has been held that military jurisdiction survives a change from contract surgeon to commissioned officer in the medical corps (Dig. Op. JAG (1912-1940), par. 369 (3), sub-par. 1); from a commission in the U. S. Guards to one in the Infantry (*id.*, sub-par. 3); from an emergency commission to a Regular commission (*id.*, sub-par. 4); from a lower grade to a higher one, *i. e.*, promotion (*id.*, sub-par. 5; 31 Op. Att'y Gen. 419), as well as from a higher to a lower one, *i. e.*, statutory demotion followed by recommissioning (Dig. Op. JAG (1912-1940), par. 369 (3), sub-par. 6); from West Point cadet to commissioned status (id., sub-par. 7); and from enlisted to commissioned status (*id.*, sub-par. 2; 2 Op. JAG (1918), p. 644). Similarly, it has been ruled that where a soldier's first enlistment is terminated by a discharge for the convenience of the government, he may be tried in the subsequent enlistment for offenses committed in the first. 1 Bull. JAG

Through 1929, the Navy Department followed the War Department and held that a reenlistment in the Navy did not render a sailor amenable to trial by court-martial in respect of an offense committed in a previous enlistment which had been terminated by an honorable discharge. CMO (Navy Court-Martial Order) 22 of 1917, pp. 7-8 (*semble; dubitante*); CMO 12 of 1921, p. 11; CMO 1 of 1926, p. 9; CMO 12 of 1929, p. 7. Thereafter, in similar cases, the Navy Department sustained its jurisdiction. Sgt. Jacob G. Keller, USMC, GCM record No. 75740 (1932); Pvt. George C. Smith, USMC, GCM record No. 76425 (1934); Mle Archie L. Hammock, USN, GCM record No. 77457 (1936); CMM Everett W. Wyatt, USN, GCM record No. 78075 (1938).[5] The

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13, par. 369(4); s. e., CM 212084, *Johnson*, 10 B. R. 213 (1939). There is an unpublished opinion to the effect that a soldier discharged in occupied territory to accept civilian employment with the American Military Government remains subject as such civilian to trial by court-martial for offenses committed while a soldier, on the ground that *qua* civilian he is in those circumstances serving with the Army within AW. 2 (d), and so was continuously subject to military law. JAGJ 1947 1146, 24 Feb. 1947. The only conflict in the rulings concerns reserve officers who committed offenses during one tour of active duty, and then were sought to be tried during a succeeding tour of active duty, where there was an intervening period of inactive status. Cf. Supp. I to Dig. Op. JAG (1912-1940), p. 10, par. 359(6), with 5 Bull. JAG 122, par. 452(1).

[5] The dissenting judge is in error in stating (R. 258, n. 7) that these cases did not involve Navy Department approval. We are advised by the Office of the Judge Advocate General,

first two cases were the basis for Changes No. 7 to *Naval Courts and Boards, 1923*, promulgated August 16, 1934 (quoted at Pet. 7-8); the first three cases cited were the basis for so much of Sec. 334 of *Naval Courts and Boards, 1937*, *infra*, pp. 30-31, as states that "the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

And this view was thereafter formally reaffirmed in CMO 7 of 1938, p. 42 (R. 209-210).

The change in the Navy Department views reflected by the later rulings is not retroactive in operation so far as petitioner is concerned. He reenlisted twice, in 1941 and again in 1946, after the new rule was announced to the naval service. Insofar, therefore, as enlistment is to be regarded as contractual (*In re Grimley*, 137 U. S. 147), the contracts which he made in 1941 and again in 1946, to "be subject to such laws, regulations and articles * * * as are or shall be established" (R. 114), contemplated a continued amenability to naval jurisdiction under the later enlistment for offen-

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Navy Department, that all of these cases were in fact reviewed in the Department by the Judge Advocate General for legal features, and by the Commandment, U. S. Marine Corps or the Chief, Bureau of Navigation (as the case might be) for disciplinary features. We are further advised that in the cases of Pvt. Smith (GCM record No. 76425) and of CMM Wyatt (GCM record No. 78075), the Secretary of the Navy personally acted on the records of trial.

ses committed but not discovered during the earlier one. Cf. *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358.

And there is no unfairness in the result. The old rule was artificial and, certainly under modern conditions, unrealistic. In earlier times, when a soldier served a full enlistment in a small company, or a sailor on board a single vessel, an honorable discharge issued by an officer constantly present might well be "a formal final judgment passed by the government upon the entire military record of the soldier" or sailor. *United States* v. *Kelly*, 15 Wall. 34, 36. But nowadays, when a soldier normally passes through half a dozen units before separation, or where a sailor who in all likelihood spent nearly all his entire service at sea is routinely discharged at a receiving station—a shore establishment—these consequences do not, *in fact*, attach to an honorable discharge. It is artificial in the extreme to suggest that the United States is now estopped by an honorable discharge signed by an officer in Brooklyn in 1946 (R. 145) who obviously neither had nor could have had any knowledge of petitioner's activities while in Japanese captivity in the Philippines from 1942 to 1944. The new Navy rule had been published to the service and could easily have been ascertained at the time of petitioner's 1941 and 1946 reenlistments, whereas his acts while he was a prisoner of the Japanese were known only to himself, to his fellow prisoners, and to his captors.

Petitioner's contention boils down to this, that, even when he voluntarily re-subjects himself to the Articles for the Government of the Navy, an honorable discharge operates as a blanket pardon for undetected offenses; the answer of the court below to this was simply (R. 255), "it does not." Petitioner's further contentions are that, while jurisdiction survives a change from sergeant to lieutenant or from petty officer to ensign (see note 5, *supra*, pp. 12-13), it is extinguished when either the sergeant or the chief signalman reenlists in grade; and that, although he receives from the Navy all the benefits of continuous service (Rel. Exh. 5, R. 128, 129), the Navy is entitled only to fragmentary non-continuous jurisdiction over him. Here again the short answer, pithily stated by the court below (R. 256), is that "the Navy has had two interpretations and their later one seems to us permissible and preferable."

C. *The Navy intended to change its rule.*—Petitioner argued below (R. 230-237) and continues to urge here (Pet. 20-21) the view that Sec. 334, *Naval Courts and Boards*, 1937, did not amount to a binding regulation or instruction.

That publication, as the court below pointed out (R. 225-226), was approved by the Secretary of the Navy and by the President. Over their signatures appeared the following direction:

> Naval Courts and Boards, 1937, is issued for the government of all persons attached to

> the naval service. It is hereby required and directed that all officers and other persons belonging to the Navy, so far as the duties of each are concerned, make themselves acquainted with, observe and comply with the provisions contained herein.

Naval Courts and Boards, 1937, is, in consequence, within R. S. 1547 (34 U. S. C. 591), *infra*, p. 27, either as "regulations" or as "instructions"—it makes no difference which—and thus has the force of law.

The change in the Navy's rulings between 1929 and 1938 was evidenced by *Naval Courts and Boards* and by a Court-Martial Order. The former was presidentially approved. And, although Court-Martial Orders in the Navy are not signed by the President, it is provided in Art. 74(4) of the presidentially approved *Navy Regulations*, 1920, that they "shall have full force and effect for the guidance of all persons in the Naval Establishment"; and it is further provided as to such orders, in Sec. 5(e) of the presidentially approved *Naval Courts and Boards, 1937*, that "officers of the Naval service are responsible for the observance of instructions contained therein, just as they are for the observance of other lawful regulations."

The bibliography of *Naval Courts and Boards* is discussed and documented at R. 243-247. Cf. *Ex parte Reed*, 100 U. S. 13, 22; *Denby v. Berry*, 263 U. S. 29, 37-38; CMO 10 of 1927, p. 4, at p. 10.

Consequently, this is a situation where the Secretary of the Navy, with the approval of the President, has said that "the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N." Sec. 334. That statement appears in a publication "issued for the government of all persons attached to the naval service," which requires that "all officers and other persons belonging to the Navy * * * comply with the provisions contained therein." On its face, that means just what it says, viz., that similar cases will be held legal in the future, and it is thereafter, see CMO 7 of 1938, p. 42 (R. 209-210), so interpreted by the Secretary of the Navy, who signs Court-Martial Orders (Art. 74(3)(d), *Navy Regulations*, 1920). In those circumstances it is perfectly clear that a like rule was to be followed until a change was duly promulgated; and, in fact, the convening authority did so follow it in this very case (R. 104-107). There is, therefore, no basis for the view, expressed in the dissent (R. 263) and in the petition (Pet. 20-21), that the intent of Sec. 334 was unclear. As the court below indicated (R. 226), the inclusion of this provision in *Naval Courts and Boards, 1937*, would otherwise be meaningless. It is certainly highly significant that no one in the naval service has, since its promulgation, been in any doubt as to its meaning.

Nor is it material (cf. R. 263; Pet 18-19) that the Army and Navy rules are now different in one narrow situation, or that there may be a policy in favor of uniform Army and Navy rules. If, as petitioner urges (Pet. 19), "The recent merger of the armed forces indicates an intention to treat all the services alike," then the short answer is that that intention has not yet been implemented by legislation. The Navy is still subject to the Articles for the Government of the Navy, enacted in 1862 and only amended piecemeal since then. The Army remains subject to the Articles of War of 1920, just amended, the amendments to be effective February 1, 1949 (Title II of the Selective Service Act of 1948; Public 759, 80th Cong., 2d sess.). The Air Force may be subject to still a third code.[9] The truth of the matter is that both legislation and executive regulations for the Army and the Navy have

[8] Petitioner is, however, in error in stating that *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.) is in conflict with the Army rule. As the authorities collected above, note 5, pp. 12-13, show, the Army consistently held that many changes in military status do not divest court-martial jurisdiction in respect of offenses committed in the earlier status.

[9] Title II of the Selective Service Act of 1948, approved June 24, 1948, goes into effect February 1, 1949. Public 775, approved June 25, 1948, makes applicable to the Air Force "the Articles of War • • • now in effect." But the amendments were not in effect on June 25, 1948, in consequence of which it may be that, after February 1, 1949, the Army will be under one set of Articles of War and the Air Force under another.

been pretty much compartmentalized since the beginning, and that while the resultant non-uniformity may or may not be a logical spectacle, it is not, as the dissenting judge seemed to think (R. 263), a "strange" one. And certainly it is for Congress and the President rather than the courts to provide whatever uniformity may now seem to be desirable.

D. *The Navy had power to change its rule.*— The Navy rule, set out in Sec. 334, *Naval Courts and Boards, 1937,* and in CMO 7 of 1938, p. 42, was not foreclosed by any governing provision of law.

(i) There is no statute governing the case; the only provision for honorable discharges from the Navy is a broad one, which does not purport to confer particular rights. See R. S. 1426-1427 (34 U. S. C. 192-193) *infra,* p. 27; cf. AW 108 (10 U. S. C. 1580); *Patterson* v. *Lamb,* 329 U. S. 539. And, as indicated above, petitioner reenlisted twice after the new ruling was announced to the service.

(ii) No judicial decision stands in the way. It is true that in *United States* v. *Kelly,* 15 Wall. 34, 36, this Court said that——

> the honorable discharge of the deserter was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status* of honor; * * *

But the *Kelly* case not only did not involve court-martial jurisdiction, it concerned a soldier who had deserted, who had then been restored to duty by the commander competent to bring him to trial for desertion, and who had thereafter been honorably discharged. This Court held that, in a suit for bounty money, the United States could not go behind the discharge to show the desertion. But since the circumstances under which Kelly was restored to duty amounted to a condonation of his offense (1 Winthrop, *Military Law & Precedents* (2d ed. 1896) *406; *Manual for Courts-Martial* (1928), par. 69*b*), the same result would have followed if the Government had been permitted to go behind the discharge. Moreover, in *United States* v. *Landers*, 92 U. S. 77, where the desertion occurred after bounty money had accrued, and where the soldier's restoration to duty involved the forfeiture of all pay and allowances due or to become due, he was held not entitled to the bounty, notwithstanding that his restoration to duty was followed by an honorable discharge.[10]

Indeed, so much of *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.), as involved AW 95, and the intimation in *Hironimus* v. *Durant*, 168 F. 2d 288, 294 (C. C. A. 4), pending on certiorari (No. 119, this

[10] "As for the argument that a discharge is equivalent to an adjudication that he had not committed any offense, the case of *United States* v. *Landers*, 92 U. S. 77, shows that *United States* v. *Kelly*, 15 Wall. 34, did not go so far as that." (R. 227.)

Term) support the Navy's view. The *Durant* case suggests that a non-Regular officer wholly inactive might be recalled for prosecution to maintain the discipline and morale of the service, and the respect in which it should be held. This intimation, not necessary to the decision in the *Durant* case, goes farther than the Navy's rule in this case, for petitioner was not recalled *in invitum*, he reenlisted voluntarily.

(iii) Petitioner's principal argument (Pet. 22-26), and, indeed, the main reliance of the dissenting judge's second opinion (R. 256-264), was that the Navy was bound by its settled administrative construction as to the effect of an honorable discharge.

The infirmity of this contention is that the Navy's earlier rule simply cannot be spelled out of anything in the statute.[11] There is not a single word in the Articles for the Government of the Navy which mentions the rule, or which suggests even by remote inference that those articles are inapplicable to one who is in the naval service at the time of trial and who was in the naval service at the time the offense was committed. As the court below aptly said (R. 255-256), "It is not as if the Navy's interpretation from 1862 to 1932 enacted the statute in that form and its opposite

[11] This differentiates *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, and *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, cited by petitioner (Pet. 23, 25-26).

interpretation from 1932 to 1948 were an invalid attempt to amend it."

Here petitioner was punished for violation of an Act of Congress, viz., AGN 8 (Second). The court-martial which tried him was lawfully constituted, it had jurisdiction of his person and of the offense, and its sentence did not exceed the legal limits. The alleged lack of jurisdiction now contended for is not derived from any statute or judicial decision, but stems from an essentially intramural rule, the invention of Bvt. Maj. Gen. Holt, Judge Advocate General of the Army from 1862 to 1875. See *United States* v. *Kelly*, 15 Wall. 34. It was a self-imposed limitation, couched it is true in jurisdictional terms, but certainly completely dehors the statute. That rule, as we have indicated, is entirely unrealistic today, and we submit that the court below was wholly correct in holding that the Navy was not bound to retain the rule, certainly not after *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.) had undermined its basis.

We recur to the analogy which the Second Circuit deemed apposite (R. 255): If an American commits an offense in Canada and then returns to the United States, Canada cannot try him while he remains here; Canada must extradite him. So, if a sailor commits an offense while in the Navy and then by discharge becomes a civilan, he cannot be tried by naval court-martial unless his offense falls within AGN 14, in which event he can in

effect be "extradited" back into the Navy. But if the American offender voluntarily returns to Canada, he has resubmitted himself to the jurisdiction of Canada, and he cannot defend on the ground that, between offense and trial, he was in the United States. So here: when appellee reenlisted, he voluntarily resubmitted himself to naval jurisdiction, and the circumstance that for fifteen hours he was a civilian did not deprive the naval court-martial of power to try him for offenses committed in the earlier enlistment.

(iv) Of course, as the court below noted (R. 227), no constitutional question arises. The Fifth Amendment expressly excepts "cases arising in the land or naval forces" from the guarantee of trial by jury, and the present case did so arise, regardless of whether "cases" be held to refer to the offense charged (*In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C. C. D. Cal.)), or to the court-martial proceeding. In either event, petitioner is within the exception. And, as we have several times pointed out, the Navy's new rule was not *ex post facto* as to petitioner.

E. *There is no conflict.*—Petitioner asserts (Pet. 21-22) that the decision below is "inconsistent" with that of the Eighth Circuit in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, and (Pet. 26-28) with that of the Ninth Circuit in *Gould* v. *Drainer*, 158 F. 2d 981, affirming *Ex parte Drainer*, 65 F. Supp. 410 (N. D. Cal.)

Actually, however, there is neither inconsistency nor conflict.

In the *Ver Mehren* case, the appellant had been tried by court-martial for draft desertion under the 1917 Act, and his counsel had waived a plea to the jurisdiction of the court-martial. He was convicted, escaped, and, many years later, surrendered himself to the military authorities and sought habeas corpus. The Eighth Circuit held, after reviewing the circumstances of his alleged induction, that he had never been lawfully inducted, that accordingly he was never in the Army, and that in consequence he could not confer jurisdiction on the court-martial by failing to plead to its jurisdiction. Obviously this differs from the present case. Petitioner here consented to the naval jurisdiction, not by reason of anything he did or failed to do before the court-martial—in fact, he did enter a plea to its jurisdiction (R. 102-107)—but because he reenlisted. No such factor was present in the *Ver Mehren* case.

Nor is *Gould* v. *Drainer* any closer to the instant case. Drainer had enlisted in the Marine Corps and deserted; thereafter he fraudulently enlisted in the Navy and was in due course honorably discharged from "the U. S. Naval Service." Subsequently he was apprehended and brought to trial before a naval court-martial for desertion from the Naval Service, viz., from the Marine Corps. On habeas corpus it was held that, since the Marine

Corps is a part of the Navy, the honorable discharge made Drainer a civilian, and that he was in consequence not subject to naval law. Assuming that the *Drainer* case gave the discharge its proper effect, it is clearly not controlling here, for while Drainer had become a civilian, petitioner by reenlisting became a sailor again—and was a sailor when tried, which Drainer was not.

But it is not necessary to labor the view that there is no conflict; petitioner admits there is none. He says (Pet. 14), "The effect of reenlistment on the power of the Navy to punish for offenses committed during a prior enlistment has never been considered by this Court nor, prior to this case, by any Federal court."

CONCLUSION

The question presented is *sui generis* and of first impression, there is no conflict, and the case was correctly decided below. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General

SEPTEMBER 1948.

APPENDIX

A. PERTINENT STATUTORY PROVISIONS RELATING TO THE NAVY, U. S. C. Title 34:

§ 176. *Establishment of grades and ratings by Secretary of Navy.*

The Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps. (June 4, 1920, ch. 228, § 7, 41 Stat. 836.)

* * * * * *

§ 192. *Honorable discharges; to whom granted.*

Honorable discharges may be granted to all enlisted persons in the Navy. (R. S. § 1426; June 11, 1896, No. 62, 29 Stat. 476.)

§ 193. *Form of honorable discharge.*

Honorable discharges shall be granted according to a form prescribed by the Secretary of the Navy. (R. S. § 1427.)

* * * * * *

§ 591. *Regulations of Navy; what constitute.*

The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner. (R. S. § 1547.)

B. ARTICLES FOR THE GOVERNMENT OF THE NAVY (R. S. 1624; 34 U. S. C. 1200).

Articles established.

The Navy of the United States shall be governed by the following articles:

* * * * * * *

OFFENSES PUNISHABLE AT DISCRETION OF COURT-MARTIAL.

Article 8. *Persons to whom applicable.*

Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy——

First (Scandalous conduct).

Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals.

Second (Cruelty):

Or is guilty of cruelty toward or oppression or maltreatment of, any person subject to his orders.

* * * * * * *

OFFENSES PUNISHABLE BY FINE AND IMPRISONMENT.

Article 14. *Persons to whom applicable.*

Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States——

* * * * * * *

Eleventh (Trial of offender after discharge).

And if any person, being guilty of any of

the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

* * * * * * *

GENERAL COURTS-MARTIAL.

* * * * * * *

Article 38. *Convening authority.*

General courts-martial may be convened:

First. By the President, the Secretary of the Navy, the commander in chief of a fleet, and the commending officer of a naval station or a larger shore activity beyond the continental limits of the United States; and

Second. When empowered by the Secretary of the Navy, by the commanding officer of a division, squadron, flotilla, or other naval force afloat, and by the commandant or commanding officer of any naval district, naval base, or naval station, and by the commandant, commnding officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station. (As amended by the Act of February 12, 1946, c. 5, 60 Stat. 4.)

* * * * * * *

LIMITATION OF TRIAL AND PUNISHMENT.

Article 61. *Limitation of trials; offenses in general.*

No person shall be tried by court-martial or otherwise punished for any offense, except as provided in article 62, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment he shall not have been amenable to justice within that period.

Article 62. *Desertion in time of peace.*

No person shall be tried by court-martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States, or by reason of some other manifest impediment shall not have been amenable to justice within that peirod, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was enlisted in the service.

C. NAVAL COURTS AND BOARDS, 1937.

Section 334 provides in pertinent part:

* * * Except for offenses provided for in article 14, A. G. N., a court martial may not

try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N.

U. S. GOVERNMENT PRINTING OFFICE 1948—805321/P.O. 118

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 231

UNITED STATES OF AMERICA EX REL. HAROLD E. HIRSHBERG, PETITIONER

v.

CAPTAIN WILLIAM R. COOKE, JR., UNITED STATES NAVY, COMMANDING OFFICER, UNITED STATES NAVAL RECEIVING STATION, BROOKLYN, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 200-212) is reported at 73 F. Supp. 990. The majority and dissenting opinions in the Court of Appeals (R. 223-227, 254-264) are reported at 168 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1948 (R. 228), and a petition for

rehearing (R. 229-241) was denied June 2, 1948 (R. 264). The petition for a writ of certiorari was filed August 17, 1948, and was granted October 18, 1948 (R. 265). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended (now 28 U.S.C. 1254(1)).

QUESTION PRESENTED

Whether a legally constituted naval court martial has jurisdiction to try a chief petty officer in the Navy for a violation of the Articles for the Government of the Navy committed during a prior enlistment, where that enlistment was terminated by an honorable discharge and was followed by reenlistment on the following day.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 48-51.

STATEMENT

The facts are not in dispute and may be summarized as follows:

On March 24, 1936, petitioner enlisted in the Navy for the period of his minority, or until May 18, 1939 (R. 38, 110, 117). On November 8, 1939,[1] being then at Canton, China, on board the

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[1] The record indicates that from April 11, 1939, to November 8, 1939, petitioner was aboard the U.S.S. *Mindanao* (R. 121), but does not clearly indicate the nature of his status after May 18, 1939, when his minority terminated. Presumably he extended his enlistment for an indefinite period after the latter date (cf. R. 38-39). In any event, the point has no materiality in this case.

U.S.S. *Mindanao,* he extended his enlistment for two years (R. 38-39, 121). When the enlistment expired, on November 7, 1941, he was stationed at Cavite, in the Philippine Islands (R. 125). He was then honorably discharged, and, on the same day, he reenlisted for four years (R. 39-40, 125). He was promoted regularly during his service, and on February 23, 1942, attained the chief petty officer rating of Chief Signalman (R. 125).

When the United States forces on Corregidor surrendered, in May 1942, petitioner became a prisoner of war of the Japanese, and remained such a prisoner for over three years, until he was liberated in September 1945 (R. 125). Thereafter he passed through various naval hospitals, and on March 26, 1946, while on duty with the Permanent Shore Patrol, Third Naval District, New York City, he received an honorable discharge by reason of the termination of his enlistment, effective at midnight of that day (R. 41, 127).

The honorable discharge (Resp. Ex. A, R. 145) was issued by a lieutenant-commander, the executive officer of the Permanent Shore Patrol, by direction. Such discharges "are not issued by the Bureau of Naval Personnel but are issued by the commanding officer of the man concerned pursuant to administrative instructions contained in the Bureau of Naval Personnel Manual" (Rel. Ex. 5, R. 129).

Petitioner reenlisted in the Navy for four years on the afternoon of the following day, March 27, 1946 (R. 41, 127). This reenlistment did "not require prior reference to the Bureau of Naval Personnel before being effected," and petitioner "suffered no break * * * in entitlement to pay and allowances due him for his naval service and he continued to be entitled to full pay and allowances as though he had not been discharged" (Rel. Ex. 5, R. 129). Similarly, by virtue of his immediate reenlistment, petitioner secured all the benefits of continuous service "in counting time for longevity pay increases * * *, transfer to the Fleet Reserve and retirement" (*ibid.*).[2]

On February 24, 1947, petitioner was served with charges dated February 12, 1947, directing his trial by a general court-martial convened by the Commandant of the Third Naval District (R. 63; Rel. Ex. 7, R. 134-141). The charges embraced nine specifications, all setting forth offenses alleged to have been committed while petitioner was a Japanese prisoner of war, between November 10, 1942, and March 1, 1944. Petitioner was tried by general court-martial between July 21 and August 12, 1947 (R. 100). He was acquitted of seven of the specifications and convicted of two, namely, maltreating persons subject to his orders,

[2] Likewise, petitioner's "Continuous Service Certificate" (Rel. Ex. 3, R. 117-127) indicates continuous service from the date of his first enlistment, on March 24, 1936, to February 21, 1947, the last date entered in it.

to wit, two other naval enlisted men who were Japanese prisoners of war and members of a work section in petitioner's charge (R. 100-101, 134-135, 136), in violation of Article 8 (Second) of the Articles for the Government of the Navy (Appendix, *infra*, p. 48). Petitioner was sentenced to 10 months' confinement, to reduction to the rating of apprentice seaman, and to dishonorable discharge from the Navy (R. 101).

On August 29, 1947, the convening authority approved the findings and sentence (Rel. Ex. 1, R. 100-109). Citing, *inter alia*, Section 334 of *Naval Courts and Boards* (1937 ed.) (See *infra*, p. 28), the convening authority discussed and rejected petitioner's contention that the court-martial had no jurisdiction over the offenses of which he was convicted by reason of the fact that they were committed during a prior enlistment from which he had been honorably discharged (R. 104-107).

The petition for a writ of habeas corpus (R. 7-21), which gave rise to the present proceeding, was filed in the District Court for the Eastern District of New York on August 18, 1947 (R. 1). The petition, so far as is now pertinent,[3] challenged the jurisdiction of the court-martial to

[3] The jurisdiction of the court-martial was also challenged on the ground that petitioner was a prisoner of war when his offenses were committed and hence not amenable to United States naval jurisdiction for such offenses (R. 10-11). This ground, rejected by both courts below (R. 203-204, 224-225), was abandoned by petitioner in this Court.

try petitioner for offenses allegedly committed during a prior enlistment from which he had received an honorable discharge (R. 8-9). The writ issued (R. 5-6), a return was made (R. 22-23) and traversed (R. 24-26), and, following a hearing at which petitioner testified (R. 30-99), the district court filed an order (R. 27-29) and opinion (R. 200-212) sustaining the writ and directing petitioner's discharge from custody. On appeal by respondent, the Court of Appeals for the Second Circuit, one judge dissenting (R. 227), reversed the order of the district court with directions to dismiss the writ and remand petitioner to respondent's custody (R. 228). On rehearing, the Court of Appeals adhered to its original views in a supplementary opinion (R. 254-256). The dissenting judge likewise adhered to his conclusions, but in a new opinion (R. 256-264).

SUMMARY OF ARGUMENT

Petitioner's trial by a Navy court-martial was authorized by Article 8 of the Articles for the Government of the Navy in that he was a "person in the Navy" both when the offenses were committed and when he was tried. The fact that petitioner had received an honorable discharge from the enlistment in which the offenses had been committed and had immediately reenlisted did not terminate petitioner's liability to trial by court-martial. If petitioner had not reenlisted, he would not have been subject to trial by court-

martial; it may be inferred from AGN 14, which extends court-martial jurisdiction to civilians for certain offenses committed while in the naval service, that there is no jurisdiction to try by court-martial *civilians* who while in the service committed offenses other than those specified in AGN 14. However, it does not follow from AGN 14 that a court-martial lacks jurisdiction to try a man who has reenlisted for an offense committed during a prior enlistment.

Typically, the Navy enlisted man who reenlists is a career sailor. For him, the expiration of an enlistment does not mark the end of naval status and the beginning of civilian status which are so significant in drawing a line between naval and civil jurisdiction. In relation to the date of an offense, the expiration of his enlistment is a purely fortuitous event, having none of the rationale of a period of limitations (AGN 61). Naval discipline and justice are not served by making court-martial jurisdiction over persons with substantially continuous naval service depend upon such accidental circumstances. This case also illustrates that under the Articles for the Government of the Navy a court-martial has jurisdiction territorially over some crimes which are without the jurisdiction of any civil court; if petitioner cannot be tried by a Navy court-martial for his offenses, he apparently cannot be tried by any court.

From 1921 to 1932, and after considerable doubt, the Navy took the position that a court-martial was without jurisdiction to try an enlisted man for an offense committed during a prior enlistment. From 1932 to the present time, the Navy has repeatedly and publicly asserted such jurisdiction. During neither of these periods did Congress make any pertinent change in the Articles for the Government of the Navy. However, the 1922 decision in *Ex parte Foly*, 290 Fed. 858, apparently revived the Navy's earlier doubts and led to the reversal of its position. While it is true that administrative failure to assert jurisdiction has been regarded as evidence of a lack of jurisdiction under an ambiguous statute, this principle of construction is not applicable where, as here, the statute literally read confers jurisdiction and a contrary interpretation would produce impractical and anomalous results.

Similarly, the Army's long-standing view that a military court-martial lacks jurisdiction in the circumstances of this case, is not persuasive. The Army's rule, like the Navy's original view, appears to be based upon an erroneous inference drawn from AW 94 (which is equivalent to AGN 14). Furthermore, the Army has departed from its general rule to the extent, for example, that it holds that jurisdiction survives where two enlistments are separated by a discharge for the convenience of the government, but does not survive

where two enlistments are separated by an honorable discharge.

Petitioner's contention that his honorable discharge from the enlistment in which his offenses were committed precludes his trial by court-martial in a subsequent enlistment, finds no support in the statutes or in judicial decisions. Since an honorable discharge which has been obtained by fraud may be revoked, it is difficult to understand why such a discharge should have the effect of a pardon for undetected crimes and a shorter period of limitations with respect to a sailor remaining in the naval service. Similarly, since an honorable discharge does not bar prosecution in a civil court for an offense committed during that enlistment which is a violation of both civil and naval law, there is no reason for precluding trial for the offense by a court-martial having personal jurisdiction over the offender, particularly since the offense may have caused detriment only to naval discipline. Also, as this case illustrates, the modern discharge procedure is routine, with the discharge often being signed by an officer whose knowledge of the sailor's conduct is derived solely from his formal record. Under these circumstances, it is entirely unrealistic to view an honorable discharge as a "formal final judgment" "upon the entire [naval] record of the [sailor]" which cuts off an otherwise admitted amenability to trial by court-martial.

ARGUMENT

I

The Navy Court-Martial Had Jurisdiction to Try Petitioner for an Offense Committed During a Prior Enlistment

A. *AGN 8 (Second) by its terms conferred jurisdiction in this case, and nothing in AGN 14 (Eleventh) requires a contrary conclusion.*

The Navy's assertion of court-martial jurisdiction over the petitioner is entirely consistent with the Constitution and the Articles for the Government of the Navy. The Constitution empowers Congress "to make rules for the government and regulation of the land and naval forces", and provides that the rights of indictment by grand jury and trial by jury shall not apply to "cases arising in the land or naval forces." Constitution, Art. I, sec. 8(14); Fifth Amendment; *Ex parte Milligan*, 4 Wall. 2, 138-139; *Ex parte Quirin*, 317 U. S. 1, 40. Pursuant to this power, Congress has provided in AGN 8 that "Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy" who commits any of enumerated offenses including those of which petitioner was found guilty.

Here petitioner was in the Navy both at the time of the offenses and at the time of his trial by a Navy court-martial. His naval service between those dates was continuous except for an interval of a few hours between his honorable dis-

charge from the enlistment which he was serving at the time of the offenses, and his reenlistment. Thus, this case does not involve trial of civilians or of camp-followers by military tribunals, nor any question as to when an individual ceases to be a civilian through entrance into the service or resumes civilian status by leaving the service, nor the statutory extension of court-martial jurisdiction over civilians who were formerly in the service, in respect of frauds committed against the Government in their military or naval status, by virtue of AGN 14 (Eleventh), *infra*, pp. 48-49, or of AW 94 (10 U.S.C. 1566). Petitioner here was not a civilian; he was in the Navy when the offenses charged against him were committed, and when he was tried; and he does not now question his naval status at either of these periods.

Petitioner does not deny that he was tried by a legally constituted court martial with jurisdiction over him and over offenses of the type with which he was charged. Instead, he asserts that there is no jurisdiction to try him for these particular offenses committed in a prior enlistment. His reasoning is that Congress has provided that court-martial jurisdiction shall survive discharge from the service only with respect to the fraud-type offenses specified in AGN 14 (and AW 94); that from this specific provision it must be inferred that court-martial jurisdiction as to all other offenses is terminated by discharge; and that since

if petitioner had remained a civilian after his discharge, the court martial would have lacked jurisdiction, it must be assumed that Congress intended that a court-martial would lack jurisdiction if he reenlisted.

At this point, it should be noted that nothing in the Constitutional provisions quoted above convey the slightest intimation that court-martial jurisdiction over offenses committed by a member of the armed forces must terminate when the offender ceases to be a member of the armed forces. The authority vested in Congress "to make rules for the government and regulation of the land and naval forces" surely embraces the power to provide for the trial under such "rules" of offenses against such rules by a soldier or sailor who has since left the service. Surely, such cases involving the trial by court-martial of a former sailor or soldier for offenses committed while in the service are "cases arising in the land or naval forces" within the meaning of the Fifth Amendment. At any rate, such was the understanding of Congress in 1863, when it provided in what is now AGN 14 that:

> * * * if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by court-martial, in the same manner and to the same extent as if he had

not received such discharge nor been dismissed.

This limited statutory extension of court-martial jurisdiction to a former sailor or soldier who has returned permanently or indefinitely to civilian status has been repeatedly sustained by the courts. *In re Bogart,* 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Cal.); *Ex parte Joly,* 290 Fed. 858 (S.D. N.Y.); *Terry* v. *United States,* 2 F. Supp. 962 (W.D. Wash.); *United States ex. rel. Marino* v. *Hildreth,* 61 F. Supp. 667 (E.D. N.Y.); cf. *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661 (S.D. N.Y.).[4] Similarly, it is established that where the jurisdiction of a court-martial attaches by the commencement of a proceeding, it is not defeated by the subsequent expiration of the enlistment and the offender remains subject to trial by court-martial and to punishment in accordance with naval (or military) law. *Carter* v. *McClaughry,* 183 U.S. 365, 383; *Hironimus* v. *Durant,* 168 F. 2d 288 (C.A. 4), certiorari denied October 11, 1948, No. 119, 1948 Term.

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[4] It is interesting to note that the British Naval Discipline Act, Articles of War, 46, provides for the trial and punishment of offenses committed by any person while subject to that Act although the offender has ceased to be subject to the Act; any proceeding must be brought within three months after the offender has ceased to be subject to the Act except for mutiny or desertion. 12 & 13 Geo. 5, c. 37. A similar provision is contained in Section 158 of the Army and Air Force (Annual) Act (See War Office, *Manual of Military Law* (1939) p. 564).

While no constitutional issue as to the scope of court-martial jurisdiction is raised in this case, the constitutional setting is relevant to the Congressional purpose as to the scope of the Articles for the Government of the Navy. Since Congress was free under the Constitution to extend the AGN to petitioner's situation, there is no reason to infer that it did not do so where the statutory language is literally applicable and where the contrary result would be impractical and incongruous.

AGN 8 (Second) (Appendix *infra*, p. 48) provides that such punishment as a court-martial may adjudge may be inflicted on "any person in the Navy" found guilty of "cruelty toward or oppression or maltreatment of, any person subject to his orders." Since petitioner was concededly a "person in the Navy" both when the offenses in question were committed and when he was tried, it is clear that this Article, literally construed, conferred jurisdiction on the court-martial to try petitioner for those offenses, as petitioner candidly concedes (Br. 10).[4a]

It is true that AGN 14 (Eleventh) (Appendix, *infra*, p. 49), provides that "if any person, be-

[4a] Petitioner states that "this broad provision is subject to limitations" and he mentions two (Br. 10). The first—that it "does not apply to an offense committed by the accused while a civilian prior to his entry into the Naval service"—is not, of course, a limitation at all, since it is perfectly clear from the context of AGN 8 that the person must be in the Navy at the time of commission of the offenses described to be subject to the punishment provided for. The other limitation mentioned by petitioner begs the question presented by this case.

ing guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed." Concededly, the implication of this provision is that the power thus conferred is limited to the particular offenses described in AGN 14. But that power is the power to reach out to persons who have completely severed their connection with the Navy and permanently resumed civilian status, and bring them to trial by court-martial notwithstanding such severance and permanent resumption of civilian status. In other words, AGN 14 empowers the Navy to try *civilians* by court-martial for specified offenses, and it may be assumed by implication that the Navy is without power to try *civilians* for offenses other than those specified in AGN 14. But here the Navy is not subjecting a civilian to trial by court-martial, for petitioner was in the Navy when he was tried for offenses committed while he was in the Navy. As recognized by both the majority and dissenting judges below, whatever negative inferences are to be drawn from AGN 14 are irrelevant to this case (R. 226, 259).

B. *Every practical consideration supports the jurisdiction of a Navy court-martial to try petitioner for offenses committed during an earlier enlistment.*

As noted above, the precise issue here is whether the Navy retains jurisdiction, subject to the statute of limitations in AGN 61, to try by court-martial enlisted men whose service between the offense and the trial is substantially continuous, notwithstanding that in the interval one period of enlistment has terminated and another begun.[5]

For the man who leaves the Naval service to return to civilian status, the expiration of his enlistment is a legally significant event, because thereafter as a civilian he may not be subjected to trial by court-martial except for the offenses specified in AGN 14. On the other hand, for the man who is making his career in the Navy, the expiration of his current enlistment has no such significance; rather, it marks only an opportunity to leave the Naval service if he so desires and, assuming he does not so desire, his right to a reenlistment gratuity under 37 U.S.C. 110.

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[5] A note in the British *Manual of Military Law*, p. 565, commenting on Section 158 of the Army and Air Force (Annual) Act, *supra*, p. 13, fn. 4, states that, "When the three months have once expired, the offender is protected, and his liability is not revived by his again becoming subject to military law." The inference is that if he reenlists within three months, i.e., so that his service is substantially continuous, he again becomes subject to trial by court-martial for offenses committed during the prior enlistment.

Furthermore, the date of the expiration of an enlistment is entirely fortuitous in relation to the date of an offense against Naval law. At the present time, for example, enlistments in the Navy may be for terms of two, three, four, or six years, 34 U.S.C. 181, and reenlistments are for terms of three, four or six years at the option of the men concerned. Bureau of Naval Personnel Manual, par. D-1002. In addition, in time of war the Secretary of the Navy may extend periods of enlistments. Thus, the period of time between the commission of an offense and the expiration of the then current enlistment is accidental—with none of the rationale underlying a statute of limitations. To illustrate: if two sailors jointly commit an offense, and prior to the institution of court-martial proceedings the enlistment of one expires and he reenlists, then, if petitioner's view is correct, one is subject to trial by court-martial while the other is not.

For the career sailor, his enlistment is for most practical purposes an indefinite term which he expects to terminate by retirement after twenty or thirty years of service. It is a startling notion that the amenability of such a man to trial by court-martial is cut off not only by the two-year statute of limitations (AGN 61), reflecting the sound policy underlying such statutes, but also by the intervening circumstance of an expiration of enlistment which bears no relation to the

administration of justice or to the maintenance of naval discipline.

It is our view that court-martial jurisdiction over persons in the Naval service should not depend upon such vagaries of chance. It is true that if petitioner had not reenlisted following his discharge on March 26, 1947, the Navy would have been powerless to proceed against him for the offenses committed during his enlistment. (It is only in respect of the offenses described in AGN 14, as we have seen (*supra*, pp. 14-15), that the Navy can do that.) And this might be thought to pose a theoretical objection to concluding that, in consequence of his reenlistment, the Navy regained its power to punish him for his prior offenses. The difficulty evaporates, however, when the problem is fairly analyzed. The reason why the Navy cannot institute proceedings against a discharged person for offenses committed prior to discharge (except for AGN 14 offenses) is the fact that the person is *no longer in the Navy*. He is a civilian. The Navy, in other words, no longer has jurisdiction over his *person*. But when the discharged man reenlists, he re-subjects his person to the Navy's jurisdiction by his voluntary act. The mere fact that between the discharge from the prior enlistment and the reenlistment the Navy had no jurisdiction over the man's person in no way detracts from its continuing jurisdiction of the *offenses*.

There is nothing extraordinary, as petitioner suggests, in the notion that jurisdiction over the person may be suspended and later revived. As the court below noted, where a man commits a crime in Canada, escapes to the United States, and subsequently returns to Canada, it would hardly be denied that the Canadian court has jurisdiction to try him notwithstanding his intervening stay in the United States during which the Canadian court lacked jurisdiction over his person. Petitioner suggests, however, that because of the possibility of extraditing the offender from the United States to Canada, the analogy fails (Br. 13). But the possibility of extradition—a matter of international comity—is clearly an accidental feature. In other words, if we assume that the two countries do not have an extradition treaty, the analogy holds. And the same situation exists in our federal system—to the surprise of many offenders.

A further practical consideration is that petitioner is apparently not subject to trial by any civil court for the offenses for which he was tried by the Navy court-martial. Since section 102 of 28 U.S. Code, referred to by the dissenting judge below (R. 260) as conferring jurisdiction upon a federal court to try petitioner, is merely a venue provision, we must look to what is now section 7 [6] of

[6] The places described in this section are: "the high seas"; "any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State"; "any vessel" (on specified conditions); "any lands reserved or acquired for the use of the United

Title 18, U.S. Code for *civil* jurisdiction outside the United States proper over the assault and battery offenses (18 U.S.C., 1946 ed., 455, now 18 U.S.C. 113) of which petitioner was found guilty. It is at least doubtful whether that section confers jurisdiction upon federal civil courts over petitioner's offenses committed on *terra firma* in the Philippine Islands. Those offenses were committed in 1943 while petitioner was a member of the United States Navy, held as a prisoner of war in Japanese custody during the Japanese occupation of the Philippine Islands. It is likely that under these circumstances, and under accepted principles of international law he was not amenable to trial by any civil court in the Philippine Islands. *The Exchange*, 7 Cranch 116, 138-141; *Coleman* v. *Tennessee*, 97 U. S. 509; *Dow* v. *Johnson*, 100 U. S. 158. In any event, even if petitioner could have been brought to trial in a Philippine court, he would not have been entitled to trial by jury. *Dorr* v. *United States*, 195 U. S. 138; Constitution of the Philippines (1935), Art. III, Sec. 1(17) (30 Pub. Laws Phil. Is., pp. 372-373). Cf. dissenting opinion below, R. 260.

States, and under the exclusive or concurrent jurisdiction thereof"; "any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building"; and "any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States."

Consequently, we believe that the dissenting judge below was in error in assuming that petitioner could have been indicted and tried for his offenses in a civil court, and that a "waiver of the right to a jury trial" (R. 263) was here involved.

We do not, of course, suggest that it necessarily follows, from his lack of amenability to any kind of trial other than by court-martial, that he must have been subject to trial by court-martial after as well as before[7] his discharge and reenlistment. But the factor of non-amenability to any other kind of trial is, we submit, one that may properly be considered in resolving the legal question which this case presents. It is to be noted that there are other situations which are reached by the AGN but to which civil jurisdiction does not extend. *Rosborough* v. *Rossell*, 150 F. 2d 809 (C.A. 1), held that a Navy court-martial lacked jurisdiction to try a sailor for a murder committed in a foreign harbor aboard a foreign vessel to which he was assigned as part of the armed guard. Congress promptly amended AGN 6 to give jurisdiction to naval courts-martial over murder committed anywhere outside the territorial jurisdiction of any particular State or the District of Columbia. Act of December 4, 1945, 59 Stat. 595. Thus, since

[7] It is, of course, unquestioned that petitioner could have been tried by court-martial before the termination of the enlistment during which his offenses were committed, if those offenses had been detected in time.

Congress has been alert to extend the jurisdiction of naval courts-martial to offenses over which our civil courts lack jurisdiction, it would be incongruous simultaneously to construe court-martial jurisdiction so as to leave such serious crimes untriable by any American tribunal.

C. *Since jurisdiction to try petitioner by court-martial is authorized by statute and has been asserted by the Navy since 1932, the Navy's earlier interpretation or practice during a shorter period is immaterial.*

Petitioner's principal argument (Br. 22-26) and the main reliance of the dissenting judge below (R. 256-264), is that the Navy is bound by its earlier disclaimer of jurisdiction to try an enlisted man for an offense committed in a prior enlistment from which he had received an honorable discharge. The obvious infirmity of this contention is that the Navy's earlier rule finds no support in the statute. It is also noteworthy that the Navy adopted its earlier rule with doubts, persisted in it for only 11[8] years (not "for at least 70 years (1862-1932)" as stated by the dissenting judge below), and has adhered to its present view for the last 16 years.

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[8] See petitioner's candid concession that he is "unable to find any rulings [on this issue] prior to" 1917 (Br. 16, note 5). The 1917 ruling to which he refers, as we show in the text which follows, was not a ruling on the question at bar, so that the next succeeding ruling cited by petitioner—that in 1921—is actually the first ruling in point.

The first recorded instance in which the Navy Department had occasion to consider the question presented in this case was in what might be called a *dictum* contained in CMO 22-1917, pp. 7-8. Because of its interest as the first Navy Court-Martial Order considering the question, and also because it reflects the doubt then entertained by the Navy in respect of the problem, it is here reproduced *verbatim:*

> DISCHARGE: *Effect of, Upon Status of Enlisted Man Committing Subsequent Offense and Reenlisting.*
>
> A question was presented as to whether an enlisted man in the Navy is amenable to trial by court martial for an offense committed on the day of, but subsequent to the delivery of, his discharge from the naval service, the man in question having reenlisted on the day following his discharge. If the man in question was discharged for any cause other than expiration of enlistment, he was not in the naval service when his offense was committed and therefore could not be tried by court martial for said offense, notwithstanding his subsequent reenlistment. If, however, the man in question was discharged by reason of expiration of enlistment he was in the naval service when his offense was committed, his discharge not having become effective until midnight of that day. Notwithstanding his subsequent reenlistment on the day following, this man's connection with the Navy had been completely severed by discharge; although in

similar cases in the Army the view has been expressed that a subsequent reappointment or reenlistment into the Army would not revive the jurisdiction for past offenses, but that such jurisdiction would properly be considered as finally lapsed,[9] yet the question is not free from doubt, and should a case arise in which the interests of the service demand the trial of a reenlisted man for an offense committed in his previous enlistment, it is considered that the question of naval jurisdiction should be raised by bringing the offender to trial by court martial to the end that he might present the jurisdictional question to the civil courts by habeas corpus proceedings. If the offense is discovered and the accused is placed under arrest to await action before his discharge takes effect, the general rule is that when jurisdiction has thus attached the same is not divested by any subsequent change in the status of the accused (File 26504-298, J.A.G., Feb. 26, 1917).

It will be observed that, while that Court-Martial Order is somewhat obscure as to the precise question involved in it, the question apparently was whether there was jurisdiction of an offense committed "on the day of, but subsequent to the delivery of, [the enlisted man's] discharge from the naval service, the man in question having reenlisted on the day following his dis-

[9] See pp. 36-41, *infra*, for a discussion of the Army's views on this and related questions.

charge." Whether or not the offense was *committed* in the service was said to depend on the nature of the discharge, *i.e.*, whether it was by reason of expiration of enlistment or otherwise. If the discharge was for any cause other than expiration of enlistment, the decision states, it was effective immediately upon delivery of the discharge papers, so that the offense did not occur while the man was in the service. If, on the other hand, it was further said, the discharge was by reason of expiration of enlistment, it did not become effective until midnight of the day of the offense, with the consequence that the offense did occur while the man was in the service—*i.e.* during the earlier enlistment. The concluding portion of the Court-Martial Order appears to be a *dictum* discussing the man's amenability to court-martial trial under the latter hypothesis, but expressing no conclusion on the matter. Somewhat prophetically, it suggested that jurisdiction should be asserted in a proper case so that the question might be decided by the civil courts in a habeas corpus proceeding.

The first square holding by the Navy Department on the issue presented in this case appears in CMO 12-1921, p. 11,[10] and the ruling was that—

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[10] Petitioner, in stating that "The origins of the present [Navy] rule are found in a case which arose in the Navy in 1919. C.M.O. 237-1919, p. 22" (Br. 17), misreads the cited Court-Martial Order. That Court-Martial Order involved the question of the amenability to court-martial trial of a person who had been discharged from the Navy, for an

> Except in cases of offenses in violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted. (File 26251-29077, J.A.G. 17 Dec. 1921.)

This ruling was followed in 1926 (CMO 1-1926, p. 9) and again in 1929 (CMO 12-1929, pp. 7-8), but was thereafter abandoned in 1932, so that the old Navy rule endured only 11 years—from 1921 to 1932.

Thereafter, the Navy Department sustained its jurisdiction in cases of this type. Sgt. Jacob G. Keller, USMC, GCM record No. 75740 (1932); Pvt. George C. Smith, USMC, GCM record No. 76425 (1934); M1c Archie L. Hammock, USN, GCM record No. 77457 (1936); CMM Everett W. Wyatt, USN, GCM record No. 78075 (1938).[11] The

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offense committed prior to discharge, where there had been no reenlistment or reappointment—obviously quite a different question from that at bar. Similarly, petitioner misreads the opinion of Attorney General Palmer in 34 Op. Atty. Gen. 521. Attorney General Palmer was not asked, nor did he consider, as stated by petitioner (Br. p. 17), whether a reenlisted man could be tried by a Navy court-martial for an offense committed during a prior enlistment; the sole question there presented was whether there was jurisdiction to try a sailor who had returned to civilian life and had *not* reenlisted.

[11] We are advised by the Office of the Judge Advocate General of the Navy that all of these cases were reviewed in

first two cases cited were the basis for Change No. 7 to *Naval Courts and Boards* (1923 ed.), promulgated August 16, 1934, as follows:

> Except for offenses provided for in that article [AGN 14], a court-martial may not try an individual who has been formally separated from the Navy and is no longer in the service (31 Op. Atty. Gen. 521; *Ex parte Wilson*, 33 Fed. (2d) 214) unless proceedings were instituted against him while he was in the service (31 Op. Atty. Gen. 521; C.M.O. 26-1917). However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute (*Ex parte Joly*, 290 Fed. Rep. 858). Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Art. 14, A.G.N. (G.C.M. Rec. No. 75740, Feb. 1, 1933, and G.C.M. Rec. No. 76425, Apr. 4, 1934).

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the Navy Department by the Judge Advocate General. We are further advised that in the cases of Pvt. Smith (GCM Record No. 76425) and of CMM Wyatt (GCM record No. 78075), the Secretary of the Navy personally acted on the records of trial. Compare the dissenting judge's remarks at R. 258, note 7.

The first three cases cited were the basis for so much of Section 334(a) of *Naval Courts and Boards* (1937 ed.) as follows:

> * * * Except for offenses provided for in article 14, A.G.N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A.G.N.

This view was thereafter formally reaffirmed in CMO 7-1938, p. 42. And the action of the convening authority in the present case (*supra*, p. 5) indicates that the Navy still adheres to its new ruling.[12] The lack of reported cases in the interval

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[12] In NAVAL JUSTICE (1945), p. 40, prepared by the Navy Department as a textbook on naval law, there is repeated the substance of Section 334(a) of *Naval Courts and Boards* (1937).

Further evidence of the Navy's understanding that under existing law a court-martial has jurisdiction in the instant case may be found in H.R. 3687 and S. 1338 (identical bills),

presumably reflects in large part the automatic extension of enlistments during the war. See 34 U.S.C. 186; ALNAV 155-41, dated December 15, 1941.

To summarize the history of the Navy's practice: Commencing in 1917, the Navy indicated that the question of jurisdiction here involved was doubtful, and it is clear that this doubt was largely engendered by awareness of the Army view that jurisdiction was destroyed by the expiration of an enlistment notwithstanding immediate reenlistment. Four years later, in 1921, it was declared flatly that jurisdiction was lacking, and this view was followed until at least 1929. Commencing in 1932, the Navy asserted jurisdiction. Between 1921 and 1932, Congress had made no pertinent change in the AGN. However, in 1922, *Ex parte Joly*, 290 Fed. 858 (S.D. N.Y.) held that an Army officer who had received an honorable discharge and had been immediately recommissioned, could be tried

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80th Cong., 1st Sess. (1947), containing proposals of the Navy Department for revision of the Articles for the Government of the Navy. Sec. 47 of both bills would have provided a new Article 5(a) defining the persons subject to the Articles as including "all persons on active duty in the naval service * * * and any such person alleged to have committed any offense against these Articles during a prior period of service." The quoted language would clearly give a court-martial jurisdiction over a person in petitioner's circumstances. However, in an accompanying letter of explanation dated May 22, 1947, and addressed by the Acting Secretary of the Navy to the Speaker of the House of Representatives, it is stated that Article 5(a) "consolidates existing law" with two stated exceptions not relevant to this case. This letter has been printed by the House Committee on Armed Services.

by court-martial for an offense (not enumerated in AW 94) committed during his earlier commission. This decision certainly cast doubt upon the often-repeated statement that "a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offenses." Winthrop, *Military Law and Precedents* (1920), p. 93. In any event, *Ex parte Jöly* apparently revived the Navy's earlier doubts, for it is cited, in Change No. 7 (1934) to *Naval Courts and Boards* (1923 ed.), *supra*, p. 27, in support of the Navy's view that it has jurisdiction to try an enlisted man for an offense committed in a prior enlistment.

Since a literal interpretation of the Articles for the Government of the Navy gives jurisdiction to a court martial in these circumstances, and since every practical consideration supports such an interpretation, there is no basis for petitioner's contention that the Navy's earlier view that jurisdiction was lacking now controls the interpretation of the statute. Admittedly, Congressional acquiescence in a long-standing administrative interpretation, or reenactment of a statute after it has been interpreted by the agency charged with its administration, has often been regarded as evidence of Congressional approval or ratification of an otherwise doubtful construction of a statute. On the other hand, this Court has made it clear that a prior administrative interpretation of a statute, even after reenactment by Congress, is not neces-

sarily frozen into the statute, and may be superseded by a subsequent administrative interpretation based upon a more mature study of the problem. Cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90. And it has also held that an administrative interpretation limiting the scope of a statute cannot prevail against the clear purpose of the statute. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369.

Accordingly, we submit that the suggestion in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, relied upon by petitioner (Br. p. 20) that a lack of statutory authority may be inferred from a prolonged failure to assert it, has no application here. There, "for a quarter century the Commission [had] made no such claim" that its stated powers with respect to interstate commerce included jurisdiction over intra-state transactions affecting commerce. (312 U. S. at 351-352). Here, for not more than 11 years the Navy followed, after doubts, the view that it lacked jurisdiction, and, a year after it adopted this view, its basis was undermined by *Ex parte Joly, supra.* Furthermore, the *Bunte* case recognized that "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise" (at p. 352). Moreover, the decision in the *Bunte* case rested not only on administrative non-user, but also upon the refusal of Congress to amend the Federal Trade Commission Act so as to expressly

grant the power in question. Actually, the instant case is stronger than *United States* v. *American Union Transport*, 327 U. S. 437, 454-455, where this Court refused to infer a lack of statutory power merely from administrative failure to assert it. Here the Navy has affirmatively asserted court-martial jurisdiction in the circumstances of this case for 16 years (1932-1948).

Petitioner also argues that "During the years in which the Navy interpreted the AGN as not extending the court-martial jurisdiction to offenses committed during prior enlistments, the Congress made no move to change this interpretation by legislative enactment. * * * It is no novel principle that the silence of Congress in the face of a long-continued departmental practice or statutory construction may be tantamount to legislative consent to such practice or interpretation." (Br. 22-23.) Here, again, the argument boomerangs. For, neither has Congress amended the basic law to repudiate the Navy's later rulings, asserting jurisdiction, which, as we have shown, have endured for a longer period than its short-lived earlier interpretation. Whatever argumentative value there is to be found in Congress' inaction, therefore, must be claimed by respondent.

D. *The assertion in Section 334(a) of Naval Courts and Boards that a court martial has jurisdiction in the instant type of situation was binding upon all naval personnel.*

We do not understand petitioner's insistence that Section 334(a) of *Naval Courts and Boards* (1937 ed.) is not a "regulation" within the meaning of 34 U. S. C. 591.[13] It may be assumed that under that statute the "orders, regulations, and instructions issued by the Secretary of the Navy * * * with the approval of the President" must be consistent with the statutes, and cannot give to Navy courts-martial a jurisdiction which Congress has not conferred by the Articles for the Government of the Navy. If the Navy lacked authority under AGN 8 to try petitioner, it cannot be supplied by Section 334(a) of *Naval Courts and Boards* (1937 ed.). If there is jurisdiction under AGN 8, it is not lost by treating Section 334(a) as an "instruction" rather than a "regulation."

Our sole reliance upon Section 334(a) of *Naval Courts and Boards* is as evidence of the Navy's interpretation of the statute which it administers as giving jurisdiction to a court-martial in the instant type of situation. The majority of the

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[13] This statute is quoted in full in the Appendix, *infra*, p. 49. It provides in pertinent part that "The orders, regulations, *and instructions* issued by the Secretary of the Navy * * *, with the approval of the President, shall be recognized as the regulations of the Navy * * *." [Italics supplied.]

court below, on petition for rehearing, relied upon Section 334(a) only as such evidence.

Both Change No. 7 (1934) to *Naval Courts and Boards* (1923 ed.) and *Naval Courts and Boards* (1937 ed.) were issued by the Secretary of the Navy with the approval of the President. Petitioner appears to be contending that Section 334(a) is an "instruction", but not an "instruction" which under 34 U. S. C. 591 is part of "the regulations of the Navy." To the contrary, it may be stated categorically that *Naval Courts and Boards* (1937 ed.), including Section 334(a), is a "regulation" having the force of law (unless inconsistent with governing statutes) and would be so regarded by everyone in the Navy. *Ex parte Reed*, 100 U. S. 13. Article 74(1) of the *United States Navy Regulations, 1920*, as amended, makes the matter entirely clear by providing that "All general rules and regulations for the guidance of, and all other general orders and general instructions to, persons in the Naval Establishment shall be contained in" certain enumerated publications, among which is *Naval Courts and Boards*. Paragraph (3)(g) of Article 74 describes *Naval Courts and Boards* as containing "the instructions * * * governing the procedure of naval courts and boards," and adds that "The order promulgating this publication * * * shall be signed by the Secretary of the Navy and approved by the President of the United States." Finally, paragraph (4) states

that orders or instructions contained in *Naval Courts and Boards* (and the other official publications enumerated) "shall have full force and effect for the guidance of all persons in the Naval Establishment," and that any publications other than those enumerated "shall not have force and effect as regulations." Clearly, therefore, Section 334(a) of *Naval Courts and Boards* (1937 ed.), announcing to the service the Navy's changed interpretation of its jurisdiction to try enlisted men for offenses committed during previous enlistments was a Navy *instruction*, having by statute, and intended by the Navy to have, the force of law. In practice, *Naval Courts and Boards* is the Navy's legal "bible". It would not occur to anyone in the Naval service that the assertion of jurisdiction in Section 334(a) is anything other than a formal binding statement by the Navy Department that jurisdiction exists.

In brief, we contend that Change No. 7 to the 1923 edition of *Naval Courts and Boards* and Section 334(a) of the 1937 edition of *Naval Courts and Boards* constituted an authoritative public interpretation by the highest Navy authority that a court-martial has jurisdiction in the circumstances of this case. Such an assertion of jurisdiction in *Naval Courts and Boards* also has the result of removing from the instant case any suggestion of an *ex post facto* application. Petitioner reenlisted twice, in 1941 and again in 1946, after the new rule was announced to the service. In so far, therefore,

as enlistment is to be regarded as contractual (*In re Grimley*, 137 U. S. 147), the contracts which he made in 1941 and again in 1946, to "be subject to such laws, regulations and articles * * * as are or shall be established" (R. 114), contemplated a continued amenability to naval jurisdiction under the later enlistment for offenses committed but not discovered during the earlier one. Cf. *Great Northern Ry. v. Sunburst Co.*, 287 U. S. 358. It is entirely true, as pointed out by petitioner and the dissenting judge below, that copies of *Naval Courts and Boards* are not distributed to every officer and enlisted man. They are distributed to all ships and shore stations and are readily available to any officer or enlisted man. Any actual ignorance of petitioner as to the Navy's rule from 1934 on differs in no respect from the average citizen's general ignorance of the contents of Title 18 of the U. S. Code.

E. *The fact that the Army has always disclaimed jurisdiction to try an enlisted man for offenses committed during a prior enlistment is not persuasive, since the Army view has no better foundation than the earlier Navy practice.*

It is undisputed that for many years the Army has entertained the view that it lacks jurisdiction in the circumstances of the instant case. Thus in *A Manual for Courts-Martial* (1928 ed.), § 10, it is

laid down as the "general rule," to which exceptions are cited, that "court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service." See also *Digest of Opinions of the Judge Advocate General* (1912), p. 515, par. VIII I 1b; Digest Op. JAG (1912-1940), sec. 369 (4).

Nothing in AW 2, which defines the persons subject to military law, even suggests that the Army lacks jurisdiction to try a soldier for an offense committed during a prior enlistment. In this respect, AW 2 is the same as AGN 8. AW 94 is identical with AGN 14 in that it specifies offenses sounding in fraud as to which the Army may try by court-martial offenders who have left the Army and returned to civilian status. We believe, although of course this is not clear, that the Army's disclaimer of jurisdiction in the instant type of situation is based upon the assumption that AW 94, by expressly extending court-martial jurisdiction to *civilians* for offenses committed while in military service, must be construed as forbidding trial of a *soldier* by a court-martial for an offense committed during a prior enlistment.

The origin of the Army's rule in such a construction of AW 94 is strongly indicated by a footnote

appended to the early statement of the rule in the 1912 edition of the *Digest of Opinions of the Judge-Advocates General* (*supra*, p. 37). In that footnote it is stated, "It is to be understood that the general rule of the nonamenability to military trial of officers and soldiers after discharge, dismissal, etc., for offenses committed prior thereto is subject to *a specific statutory exception, viz., that provided for in the concluding provision of the sixtieth* [14] *article* [of war]." [Italics supplied.] Added confirmation as to the probable origin of the rule is to be found in the following passage from 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) 124:

> JURISDICTION AFTER A SECOND APPOINTMENT OR ENLISTMENT. It remains to refer to the effect, *per se*, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned, &c., or discharged,) upon his amenability to trial for an offence committed prior to such discharge, &c., (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. *Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th article, it is the opinion of the author that*, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the

[14] AW 94 was AW 60 prior to 1920.

> military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. *In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offences, but the same would properly be considered as finally lapsed.* [Italics supplied.]

As we have already pointed out in connection with AGN 14, which is identical with AW 94, this express statutory extension of court-martial jurisdiction to civilians who committed specified offenses while in the military service, can support the negative implication that such persons cannot be tried by court-martial for any *other* offenses. It cannot support the inference that a court-martial lacks jurisdiction to try a person who is a soldier for an offense committed when he was a soldier.

Also, assuming the relevancy of Army practice, it should be noted that despite the tenacity of the Army rule in the specific type of situation here presented, the more recent Army rulings adopt the view that a change within an individual's military status is immaterial so long as his service is continuous or substantially so. See *A Manual for Courts-Martial* (1928 ed.), § 10, next to last paragraph. Thus it has been held that jurisdiction sur-

vives a change from contract surgeon to commissioned officer in the medical corps (Dig. Op. JAG (1912-1940), § 369(3), par. 1, citing decisions rendered in 1917 and 1918); from a commission in the United States Guards to one in the Infantry (*id.*, par. 3, citing a 1918 decision); from an emergency commission to a Regular commission, accepted the day following discharge from the previous commission (*id.*, par. 4, citing three decisions rendered in 1921); from a lower grade to a higher one, *i.e.*, promotion (*id.*, par. 5, citing a 1921 decision); from a higher grade to a lower grade, *i.e.*, statutory demotion followed by recommissioning (*id.*, par. 6, citing a 1923 decision); from West Point cadet to commissioned status (*id.*, par. 7, citing a 1935 decision); and from enlisted to commissioned status (*id.*, par. 2, citing a 1918 decision). Similarly it has been ruled that where a soldier's first enlistment is terminated by a discharge for the convenience of the Government, he may be tried in the later enlistment for offenses committed in the earlier. 1 Bull. JAG 13, § 369 (4), citing a 1939 decision. And there is an unpublished opinion to the effect that a soldier discharged in occupied territory to accept civilian employment with the American Military Government remains subject (as a civilian serving with the Army, within AW 2(d) to trial by court-martial for offenses committed while a soldier. (JAGJ 1947/1146, 24 Feb. 1947.[15]

[15] The only conflict in the rulings concerns reserve officers who commit offenses during one tour of active duty, and then

Thus, presumably in response to practical considerations and under the influence of *Ex parte Joly, supra,* the Army's disclaimer of jurisdiction in situations where the military service of the offender has been substantially continuous, is now limited to the situation where as here two enlistments are separated by an honorable discharge. As noted above, Army court-martial jurisdiction survives where two *commissions* are separated by an honorable discharge, *Ex parte Joly, supra,* and where two *enlistments* are separated by a discharge *for the convenience of the Government.* 1 Bull. JAG 13, § 369(4); yet jurisdiction is said to lapse where two *enlistments* are separated by an *honorable* discharge. Surely, this is a distinction without differences, unless an honorable discharge is to constitute a blanket pardon for or condonation of undetected offenses.

II

The Navy's Jurisdiction to Try Petitioner for Offenses Committed During a Prior Enlistment is not Defeated by the Fact that Petitioner Received an Honorable Discharge at the Expiration of that Enlistment and Before the Navy was Aware of the Offenses for which He was Tried.

Petitioner also urges that his honorable discharge from the enlistment in which the offenses were committed is a judgment, in the sense of *res*

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are sought to be tried during a succeeding tour of active duty, where there has been an intervening period of inactive status. Cf. Supp. 1 to Dig. Op. JAG (1912-1940), p. 10, § 359(6), citing a 1941 decision, with 5 Bull. JAG 122, § 452(1), citing a 1946 decision, without reference to the 1941 decision.

judicata, terminating the jurisdiction of a Navy court-martial to try him for such offenses. In support of this contention it is asserted that, "An honorable discharge has been determined by this court to be 'a formal, final judgment, passed by the Government upon the entire military record of a soldier, and an authoritative declaration by it, that he had left the service in a state of honor.' *United States* v. *Kelly*, 82 U. S. 34; *Ex parte Drainer*, *supra*; *In re Fong Chew Chung*, 149 F. (2d) 904; *United States* v. *Landers*, 92 U. S. 77." (Br. 31.)

None of these cases even suggests that an honorable discharge, under the circumstances of this case, is to have the effect of (a) a pardon for offenses committed in the earlier enlistment but not known to the naval authorities at the time of discharge, and (b) a shorter statute of limitations for offenses not barred by limitations at the time of discharge. It is true that in *United States* v. *Kelly*, 15 Wall. 34, 36, this Court said that:

> * * * the honorable discharge of the deserter was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status* of honor; * * *

But the *Kelly* case did not involve court-martial jurisdiction, it concerned a soldier who had deserted, who had then been restored to duty by the

commander competent to bring him to trial for desertion, and who had thereafter been honorably discharged. This Court held that, in a suit for bounty money, the United States could not go behind the discharge to show the desertion. But since the circumstances under which Kelly was restored to duty amounted to a condonation of his offense (1 Winthrop, *Military Law & Precedents* (2d ed. 1896) 406; *Manual for Courts-Martial* (1928), ¶69*b*), the same result would have followed if the Government had been permitted to go behind the discharge. Moreover, in *United States* v. *Landers*, 92 U. S. 77, where the desertion occurred after bounty money had accrued, and where the soldier's restoration to duty involved the forfeiture of all pay and allowances due or to become due, he was held not entitled to the bounty, notwithstanding that his restoration to duty was followed by an honorable discharge. Thus, as the court below noted, the later *Landers* decision shows that *United States* v. *Kelly*, *supra*, did not hold that "a discharge is equivalent to an adjudication that he had not committed any offense" (R. 227).

Ex parte Drainer, 65 F. Supp. 410 (N.D. Cal.), affirmed as *Gould* v. *Drainer*, 158 F. 2d 981 (C.A. 9), also relied upon by petitioner, simply held that Drainer's honorable discharge from the Navy precluded his trial by court-martial for desertion from a prior enlistment. Assuming that the

Drainer case gave the discharge its proper effect, there remains a crucial distinction from the instant case, for while Drainer had become a civilian, petitioner by reenlisting became a sailor again—and was a sailor when tried, which Drainer was not. As to *In re Fong Cree Chung*, 149 F. 2d 904 (C. A. 9) it simly holds that an honorable discharge should be given full weight as against the government in naturalization proceedings.

The statutes providing for honorable discharges from the Navy do not purport to confer particular rights. 34 U.S.C. 192-193. So it has been held that an honorable discharge which has been obtained by fraud or issued by mistake may be revoked. 28 Op. Atty. Gen. 170. Thus, nothing in the governing statutes requires that an honorable discharge have the effect of *res judicata* as to undetected crimes. Similarly, it is established that an honorable discharge from an enlistment does not preclude trial and punishment by a civil court for an offense committed during that enlistment which is a violation of both civil and military law. (*Neall* v. *United States*, 118 Fed. 699 (C.A. 9); *United States* v. *MacDonald*, 265 Fed. 695 (E.D. N.Y.). Why, then, should it bar trial by a court-martial with personal jurisdiction over the offender, since the offense may well have been far more detrimental to naval or military discipline than to the maintenance of the civil peace?

Furthermore, any emphasis on the nature of an *honorable* discharge, derived of course from *United States* v. *Kelly*, *supra*, ignores the fact that the Navy issues other types of discharges which, while lacking the opprobrium of dishonorable and bad-conduct discharges, illustrate that discharges generally cannot be regarded as having the purpose and result urged by petitioner. Thus, the Navy issues "general discharges" and "undesirable discharges", *Bureau of Naval Personnel Manual*, pp. 263-264. Neither of these purports to be "an authoritative declaration" that a sailor has "left the service in a status of honor", but why should an honorable discharge have some further alchemic effect as a pardon for undetected offenses?

The facts of this case illustrate perfectly why an honorable discharge cannot be treated literally as "a formal final judgment passed by the government upon the entire military record of the soldier" or sailor. *United States* v. *Kelly*, *supra*, at p. 36. In earlier times, and in much smaller military and naval forces, when a soldier served a full enlistment in a small company, or a sailor on board a single ship, an honorable discharge issued by an officer constantly present might well be so regarded. Today, when a soldier normally passes through half a dozen units before separation, or where a sailor who in all likelihood spent nearly all his entire service at sea is routinely discharged at a receiving station—a shore establishment—these

consequences do not, *in fact*, attach to an honorable discharge. It is artificial in the extreme to suggest that the United States is now estopped by an honorable discharge signed by an officer in Brooklyn in 1946 (R. 145) who obviously neither had nor could have had any knowledge of petitioner's activities while in Japanese captivity in the Philippines from 1942 to 1944. Actually, the executive officer of the Permanent Shore Patrol, Third Naval District, who signed petitioner's discharge did so on the basis of petitioner's service record which would include a statement of any convictions by a navy court. In fact, most discharges from the Navy are signed by officers who have no personal knowledge of the man's past conduct and must act solely on the basis of the service record which accompanies a naval enlisted man or officer from one duty station to another. And so here, the officer signing petitioner's honorable discharge was in no position to pass judgment upon petitioner's conduct while a prisoner of war in the Philippine Islands. Under these circumstances, it is literally true that to give an honorable discharge the exculpatory effect sought by petitioner is to constitute it both a pardon and fortuitous period of limitation for undetected offenses.

Petitioner's solicitude for the millions of Americans who have received honorable discharges from the Navy and who again might be called upon to serve (Br. p. 31) is misplaced. The men who

by their conduct have made an honorable discharge a thing of honor are not likely to welcome making of it a refuge for those who would otherwise be subject to trial by court-martial. Petitioner's construction of the two-year statute of limitations in AGN 61 as being tolled during the period a man is in civilian status is unsupported by any judicial decision or by any Navy interpretation. In any event, we are here concerned with a sailor whose naval service has been substantially continuous and as to whom there arises no question of limitations.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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DECEMBER 1948.

APPENDIX

The Articles for the Government of the Navy (34 U.S.C., 1946 ed., 1200) provide in pertinent part:

* * * * *

Article 8. *Persons to whom applicable.*

Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—

* * * * *

Second (Cruelty).

* * * [who] is guilty of cruelty toward or oppression or maltreatment of, any person subject to his orders;

* * * * *

Article 14. *Persons to whom applicable.*

Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States—

First (Presenting false claims).

Who presents * * * any claim against the United States * * *, knowing such claim to be false or fraudulent; or

* * * * *

Tenth (Any other fraud against United States).

> Who executes * * * any other fraud against the United States.
>
> *Eleventh (Trial of offender after discharge).*
>
> And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

* * * * * *

Section 1547 of the Revised Statutes (34 U.S.C., 1946 ed., 591) provides:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

Article 74 of *United States Navy Regulations, 1920*, as amended, provides in pertinent part:

> (1) All general rules and regulations for the guidance of, and all other general orders and general instructions to, persons in the Naval Establishment shall be contained in the following publications:
>
> (a) Regulations for the Government of the Navy of the United States (Navy Regulations).

* * * * *

(g) Naval Courts and Boards.

* * * * *

(2) * * *

(3) The scope of the publications enumerated in the preceding paragraphs shall be:

(a) Navy Regulations: These shall include all regulations requiring the original approval of the President of the United States * * *. * * * The Navy Regulations shall be signed by the Secretary of the Navy and approved by the President of the United States.

* * * * *

(g) Naval courts and boards: This shall include both the instructions and the forms governing the procedure of naval courts and boards. The order promulgating this publication and the order for all changes that may be made therein shall be signed by the Secretary of the Navy and approved by the President of the United States.

* * * * *

(4) Orders or instructions contained in any of the publications enumerated in the two preceding paragraphs of this article shall have full force and effect for the guidance of all persons in the Naval Establishment. No other general regulations, general orders, or general instructions to the Naval Establishment shall be signed or issued by any bureau

or office under the control of the Navy Department. This provision shall not be construed as prohibiting the publication by the bureaus or offices of the Navy Department of circulars or similar publications for the dissemination of information to the service, as may be authorized by the Secretary of the Navy, but such publications shall not have force and effect as regulations * * *

U. S. GOVERNMENT PRINTING OFFICE 1943